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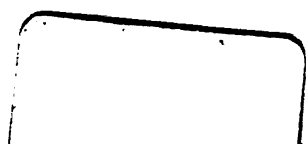
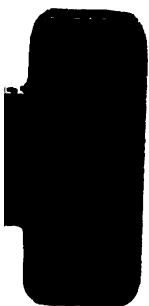
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**REPORTS OF CASES**

**DETERMINED IN**

**THE DISTRICT COURTS OF APPEAL**

**OF THE**

**STATE OF CALIFORNIA**

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**FROM APRIL 5, 1920, TO MAY 28, 1920**

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**RANDOLPH V. WHITING**  
**REPORTER**

---

**FRED L. STEWART**  
**HENRY F. WRIGLEY**  
**WILLIAM F. TRAVERSO**  
**ASSISTANT REPORTERS**

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**VOLUME 47**

**SAN FRANCISCO**  
**BANCROFT-WHITNEY COMPANY**  
**1922**

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---

<sup>1</sup> Resigned.

<sup>2</sup> Appointed May 3, 1920, in place of W. A. Sloane, resigned.

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**REPORTS OF CASES**  
**DETERMINED IN**  
**THE DISTRICT COURTS OF APPEAL**  
**OF THE**  
**STATE OF CALIFORNIA.**

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[Civ. No. 8045. First Appellate District, Division One.—April 5, 1920.]

**A. B. DYER, Respondent, v. ROZENE M. MINTURN,**  
**Executrix, etc., et al., Appellants.**

[1] **ACCOUNTS—RECIPROCAL DEMANDS—STATUTE OF LIMITATIONS.**—An account showing on one side the different items furnished and amounts paid by one person for the joint benefit of himself and another, and on the other side the different items furnished and amounts paid by the latter for like purposes, a balance being shown in favor of the former, constitutes a mutual account; and an action thereon commenced within four years from the date of the last item thereof is not barred by the statute of limitations.

[2] **ID.—ACTION AGAINST EXECUTOR—CORRECTNESS OF BOOKS AND CLAIM—EVIDENCE ADMISSIBLE.**—In an action against an executor upon a mutual, open, and current account against the deceased, while the plaintiff is prohibited by subdivision 3 of section 1880 of the Code of Civil Procedure from testifying as to the correctness of his books, or that the entries therein made are true and correct, it is not error to permit him to testify that the account embodied in the rejected claim sued on corresponds with the account in his books.

[3] **ID.—NONPAYMENT—PLEADING—PROOF.**—While, in such an action, the plaintiff must plead nonpayment of the debt sued upon, such allegation need not be proved, but the burden of proof of pay-

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1. What are mutual accounts, note, *Ann. Cas.* 1913D, 816; within the statute of limitations, note, 1 *A. L. R.* 1060.

ment is upon the defendant; therefore, prejudicial error is not committed in allowing the plaintiff to testify that the account has not been paid.

- [4] **ID.—BOOKS OF DECEASED—CORRESPONDENCE OF CLAIM WITH—EVIDENCE.**—In an action against an executor upon a mutual, open, and current account against the deceased, it is not error, in violation of subdivision 3 of section 1880 of the Code of Civil Procedure, for plaintiff to call the executor as a witness and prove by him that the claim sued upon corresponds with the books kept by the deceased. Such evidence does not involve or relate to a "matter of fact occurring before the death of the deceased."
- [5] **ID.—ACTION ON — BALANCE DUE — NONPAYMENT — EVIDENCE.**—In this action against an executrix and executor upon a mutual, open, and current account against the deceased, that there was a balance due plaintiff was proved by the introduction in evidence by the defendants of the books of the deceased, supplemented by the testimony of the defendants' witness that the account sued upon was "substantially the same" as the account shown by the books of the deceased. Proof of payment of the balance due was a matter resting upon the defendants.
- [6] **ID.—ACTION AGAINST EXECUTOR—FORM OF JUDGMENT.**—In an action against the executors on a rejected claim against the estate of the deceased, a personal judgment against the defendants, without directing, as required by section 1504 of the Code of Civil Procedure, that the payment thereof be made by defendants in the due course of administration, is erroneous; but such error may be corrected by a modification of the judgment.

**APPEAL** from a judgment of the Superior Court of Fresno County. Geo. E. Church, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

K. Van Zante and L. L. Cory for Appellants.

Short & Sutherland for Respondent.

**KNIGHT, J., pro tem.**—This is an appeal by defendants from a judgment rendered in plaintiff's favor for the sum of \$892.01, in an action instituted by plaintiff against the representatives of the estate of James W. Minturn, deceased, for the purpose of establishing the validity of a rejected claim presented against said estate by plaintiff for a balance claimed to be due upon a mutual, open, and current account.

Minturn died on May 27, 1917. Defendants deny the indebtedness, aver payment, and plead the statute of limitations.

The question of the application of the statute of limitations depends upon the character of the account sued upon. If, as plaintiff avers, a "mutual, open, and current account" has been shown, the action is not barred by the statute, for the reason that suit was commenced within four years from the date of the last item of the account. (Subd. 2, secs. 337 and 344, Code Civ. Proc.) Appellants claim that no mutual, open, and current account has been shown. In this respect it is contended that the account sued upon lacks mutuality and reciprocal demands and is merely a statement showing payments advanced by plaintiff to third persons for and on behalf of plaintiff and said Minturn, for which suit should have been brought within two years from the date of the last item stated therein. (Subd. 1, sec. 339, Code Civ. Proc.)

[1] From the evidence it is made to appear that plaintiff and the deceased, Minturn, purchased jointly and paid for in installments certain residence property in Fresno, which they remodeled and afterward used as their home. Both plaintiff and deceased advanced money to pay for labor and materials in the renovation of the dwelling, and each kept a book of account in which entries of such payments were made. The account sued upon, which is set forth in the rejected claim, was taken by plaintiff from plaintiff's books. Upon its face it shows the various entries of debit and credit in separate columns. The debit column represents the payments made by plaintiff to persons who performed work and furnished materials in the improvement and repair of said residence, and covers a period from September 30, 1912, to January 4, 1914, and also represents the payments made by plaintiff on the land, and the interest on deferred payments, from October 7, 1914, to and including November 13, 1916. The credit column shows the payments made by Minturn to persons performing work and furnishing materials for said residence, and also the payments by him on the land, and the interest on deferred payments. Upon its face the account appears to have been balanced, and shows that plaintiff expended \$10,866.51 more than Minturn, and that one-half thereof, to wit, \$5,433.25,

was charged to Minturn, of which Minturn had paid \$4,500, leaving a balance due in favor of plaintiff of \$933.26. In other words, on the one side of the account are shown the different items furnished and amounts paid by plaintiff for the joint benefit of himself and Minturn, and on the other side are shown the different items furnished and amounts paid by Minturn for like purposes, and a balance is shown in favor of plaintiff. From the face of the account it appears that the items constitute mutual credits founded on an implied agreement for the setoff of mutual debts; that the parties dealt with each other in the same relation, and the items of the account are capable of being set off against each other. The credit items do not consist of money payments from one to the other, but are made up of demands of a reciprocal character, and the account was permitted to run with a view of ultimate adjustment by the settlement and the payment by one to the other of the balance. Such an account possesses all the elements necessary to constitute a "mutual" account, and it must be so held. (*Millet v. Bradbury*, 109 Cal. 170, [41 Pac. 865]; *Fraylor v. Sonora Min. Co.*, 17 Cal. 594; *Norton v. Larco*, 30 Cal. 126, [89 Am. Dec. 70]; *Flynn v. Seale*, 2 Cal. App. 665, [84 Pac. 263].) Suit was commenced on the account within four years from the date of the last item thereof, and therefore plaintiff's action was not barred by the statute.

[2] Appellants' second point is that the court erred in admitting evidence in violation of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, which provides that parties or assignors of parties to an action or proceeding, the persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against an estate of a deceased person, cannot testify as to any matter or fact occurring before the death of such deceased person. The instance first complained of is where plaintiff, having been called as a witness in his own behalf, was handed the rejected claim, which had been admitted in evidence without objection, and testified that with the exception of one item thereof, amounting to \$41.25, the rejected claim was a correct statement of the account as shown by his books. It is claimed by appellants that this testimony was admitted contrary to the rule stated in *Colburn v. Parrett*, 27 Cal. App.

541, [150 Pac. 786], and the authorities therein cited, which hold that while a plaintiff himself may by his own testimony establish the fact that he kept books of account at a stated time, and that the books produced were the ones kept by him, he may not testify as to the correctness of said books, nor that the entries therein made are true and correct, for the reason that the giving of such testimony by a plaintiff would, in effect, be allowing the plaintiff to testify that he rendered to the deceased the services, or furnished the materials, or delivered the goods, etc., as the case may be, which the entries represent. But the testimony of plaintiff in the instant case did not extend that far. Plaintiff did not testify as to the correctness of his books of account, nor to the correctness of the account embodied in the rejected claim. He merely testified that the account embodied in the rejected claim was correct *as shown by his books of account*. In other words, he testified in effect that the account embodied in the rejected claim was a correct reproduction of the account shown by his books; that it did not vary or differ from the account shown by his books. That the trial court so understood the testimony and was guarding carefully against a violation of the provisions of said section 1880 is clearly shown by the court's ruling, made immediately following the admission of this evidence, wherein the court ordered stricken out the affirmative answer given by plaintiff in response to a question asked by plaintiff's counsel, to wit: "And is a true account of your dealings with Mr. Minturn?" and by the court's effort to clarify the record by asking the question: "The question was simply whether your books show that [claim] to be correct, and you have stated in regard to one item that you waive that. Now otherwise your answer would be that the books do show it?" To which the plaintiff replied, "Yes, sir." It may be conceded that if plaintiff had been allowed to testify that his books or the account as set forth in the rejected claim were correct it probably would have constituted error. Such testimony was held to be admissible in *Roche v. Ware*, 71 Cal. 375, [60 Am. Rep. 539, 12 Pac. 284]; but that case was criticised in the later cases of *Colburn v. Parrett*, *supra*, and *Stuart v. Lord*, 138 Cal. 672, [72 Pac. 142]. The cases last cited both hold, however, that the plaintiff may testify that he kept such books of account,

and that the books produced were his books. Plaintiff's testimony in the instant case did not go even that far. He merely testified in effect that the account embodied in the rejected claim corresponded with the account in his books. It may be, as stated by the learned trial court in passing upon defendants' objection to the testimony, that such testimony might have been excluded upon the ground that the books were the best evidence. But defendant declined to urge that objection. The testimony, therefore, was properly admitted, and the court's ruling was free from error.

[3] Appellants next claim that said section 1880 was violated in allowing plaintiff to testify that the account had not been paid. There was no error committed. By seeking to establish nonpayment plaintiff was endeavoring to prove something that the law did not require him to prove. In *Melone v. Ruffino*, 129 Cal. 514, [79 Am. St. Rep. 127, 62 Pac. 93], it is held that the allegation of nonpayment of a debt sued upon, though necessary to make the complaint perfect, need not be proved; but the burden of proof of payment is upon the defendant. Such is the established rule in this state. (*Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 300, [111 Pac. 760]; *Miller & Lux v. Dunlap*, 28 Cal. App. 313, [152 Pac. 309]; *Stuart v. Lord*, *supra*.) [4] Neither was it error for plaintiff to call as witness Ward Minturn, one of the executors defendant, to prove by him that the claim sued upon corresponded with the books kept by deceased. Such evidence did not involve or relate to a "matter of fact occurring before the death of the deceased," and the point becomes entirely lacking in force in view of the fact that defendants afterward, as a part of their own case, called the same witness and proved by him that the account sued upon and the books of the deceased were "substantially the same." Thereupon defendants offered the books of the deceased in evidence.

There is no merit in the point that the evidence is insufficient to support the findings. There were but three disputed issues: The character of the account sued upon, the payment of the balance due, and the statute of limitations. The first and third issues have been discussed and disposed of. [5] That there was a balance due plaintiff was proved by the introduction in evidence by defendant of the books of



the deceased, supplemented by the testimony of defendants' witness, Ward Minturn, that the account sued upon was "substantially the same" as the account shown by the books of the deceased. It is true that the contents of those books were not read into the record or copied into the transcript on appeal, but all intendments are in favor of the judgment of the lower court, and if, as testified to by the defendant Ward Minturn, the books of deceased and the account sued upon "were substantially the same," those books must have shown a similar balance due. The proof of payment of the balance due was, as we have seen, a matter resting upon the defendants, and they offered no proof on that point. In *Cowdery v. McChesney*, 124 Cal. 363, [57 Pac. 221], it was held that books of account kept by a deceased person if not containing proof of payment of plaintiff's claim may be looked to for evidence of the negative fact of nonpayment by deceased during his lifetime; and the foundation for the introduction of said books may be made even by plaintiff if the books were kept by him.

[6] Appellants' final point is that the judgment is erroneous because it is a personal judgment against the defendants, without directing, as required by section 1504 of the Code of Civil Procedure, that the payment thereof be made by defendants in the due course of administration. Respondent concedes this point. The error may be corrected by a modification of the judgment. (*Drake v. Foster*, 52 Cal. 225; *Vance v. Smith*, 124 Cal. 219, [56 Pac. 1031]; *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, [166 Pac. 371].)

The judgment is therefore modified by adding thereto the words, "And it is further ordered, adjudged and decreed that said executrix and executor of said last will and testament pay in due course of administration the amount of this judgment," and as thus modified the judgment will stand affirmed. Respondent will recover his costs.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 3186. First Appellate District, Division One.—April 6, 1920.]

GEORGE J. LITTLE, Special Administrator, etc., Appellant, v. S. F. SMITH et al., Respondents.

- [1] **JUDGMENTS—ACTIONS TO SET ASIDE DEEDS—RES ADJUDICATA.**—A judgment in favor of the defendants in an action to set aside certain deeds upon the grounds of undue influence and fraud is *res adjudicata* in a subsequent action between the same parties to set aside said deeds upon the grounds of undue influence and mental incompetency, notwithstanding in such former action plaintiff's proof of undue influence was excluded by the court upon the ground that the complaint failed to state sufficient facts, and plaintiff accepted that ruling of the court, failed to amend, and did not appeal. The fact that the judgment may have been based upon a defective complaint did not render the judgment void, nor minimize its effectiveness concerning all issues raised by the pleadings.
- [2] **ID.—SEVERAL ALLEGED GROUNDS OF INVALIDITY—INCORPORATION IN ONE ACTION.**—A party who seeks to set aside deeds cannot commence and maintain against the same parties as many consecutive, independent suits to accomplish that purpose as he has grounds upon which to make the attack, but he must embody all of his alleged grounds of invalidity in one action.

APPEAL from a judgment of the Superior Court of Ventura County. H. T. Dewhirst, Judge. Affirmed.

The facts are stated in the opinion of the court.

Earl E. Moss for Appellant.

Wiley & Lambert and Argabrite & Drapeau for Respondents.

KNIGHT, J., *pro tem.*—This is an appeal by plaintiff from a judgment entered in favor of defendants in an action brought by plaintiff as special administrator of the estate of William A. Smith, deceased, to set aside two deeds, executed by deceased to defendants, upon the grounds of undue influence and mental incompetency. The defendants, besides denying the two principal charges, pleaded in bar of plaintiff's recovery a former judgment rendered in a suit

previously commenced by plaintiff as such special administrator against these defendants to set aside the same deeds upon the grounds of undue influence and fraud. The court in the action at bar found against the issues of undue influence and mental incompetency, and further found that said former judgment was a bar.

Plaintiff urges three grounds for reversal—first, that the former judgment is not a bar; second, that the court erred in not compelling the defendant S. F. Smith, who was the attending physician of the deceased during his last illness and also one of the grantees named in the deeds, to testify as to the mental and physical condition of the said grantor at or about the time of the execution of the deeds; and, third, that the evidence is insufficient to support the findings to the effect that there was no undue influence or mental incompetency.

The principal question in the case is whether or not said former judgment is *res adjudicata*. If it shall be determined that it is, the other two questions become immaterial.

It is the contention of appellants that said former judgment cannot be held *res adjudicata* for two reasons: First, because the issue of undue influence was not determined in the former action, and, secondly, because in the instant case there is set forth an entirely new and separate cause of action, namely, the mental incompetency of the grantor.

The facts are that on October 1, 1914, plaintiff, as special administrator, commenced suit in Ventura County against these defendants to set aside the deeds in question, upon the grounds of undue influence and fraud. On stipulation that action was transferred to Kern County and tried by the court sitting with a jury. When plaintiff offered proof in support of the issue of undue influence the court sustained the objection of the defendants upon the ground that the complaint, in so far as that issue was concerned, did not state facts sufficient to constitute a cause of action, and further proof on that issue was excluded. No leave to amend was asked or granted. At the conclusion of the trial the court declined to adopt the special verdicts of the jury, and entered a decree in favor of defendants, upholding the validity of the deeds. No appeal was taken. On October 14, 1916, plaintiff, as special administrator, commenced the present action in Ventura County, against the same defend-

ants, attacking the same deeds, upon the grounds of undue influence and mental incompetency. The action was tried by the court sitting without a jury, with the result already stated, that is, the court found against the issues of undue influence and mental incompetency and held that the judgment in the former action constituted a bar.

The evidence offered and received in the lower court upon the question of *res adjudicata* consists of the judgment-roll in the former action and certain oral testimony given by one of plaintiff's attorneys. The judgment-roll discloses that there was an attempt made by plaintiff to plead a cause of action upon the ground of undue influence, but the findings and judgment are silent on that issue. Ordinarily it would be held, in the absence of a record of the evidence showing to the contrary, that the failure to find upon matters affirmatively alleged in the pleadings gives rise to the presumption that no evidence was offered in support of such affirmative matter (*Hertel v. Emireck*, 178 Cal. 534, [174 Pac. 30]), from which it would necessarily follow that the judgment in the action determined all matters presented by the pleadings. (*Woolverton v. Baker*, 98 Cal. 628, [33 Pac. 731].) In the present action, however, plaintiff, over the objections of defendants, was allowed to supplement the contents of the judgment-roll by the oral testimony of one of plaintiff's attorneys, who testified that when plaintiff offered proof in that action of undue influence the court sustained the objection of the defendants and excluded all such proof, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. Upon this oral testimony appellant predicates the theory that the issue of undue influence was not heard or determined in the former action, and consequently the judgment in that case cannot be held *res adjudicata*. In support of such theory defendant relies principally upon the cases of *Purcell v. Victor Power etc. Co.*, 29 Cal. App. 505, [156 Pac. 1009], *Bank of Visalia v. Smith*, 146 Cal. 398, [81 Pac. 542], and *Southern Pacific Co. v. Edmunds*, 168 Cal. 415, [143 Pac. 597]. Those cases do not support appellant's views, however, and are clearly distinguishable from the action at bar. In *Purcell v. Victor Power Co.* the first action "was one in ejectment, in which alone was involved the question of the right to the possession, not of the whole premises of the Bonanza claim,

but of a fractional part thereof; while the present is a suit to quiet title, in which the question of the ownership of the fee in another and different fractional portion of the lands of said claim is involved." It will thus be seen that the two actions did not involve the same subject matter. In *Bank of Visalia v. Smith* there was a finding upon an issue which was not tendered by the scope of the pleadings, and the judgment was silent thereon. It was held that the judgment did not operate as an estoppel in a subsequent action brought to determine that issue. In *Southern Pacific Co. v. Edmunds* it was in substance held that if during trial an issue is withdrawn on stipulation from the scope of the case, the judgment in the case does not constitute *res adjudicata* on that issue. The rule in the case last cited is in accord with the later case of *Miller & Lux v. James et al.*, 180 Cal. 38, [179 Pac. 174], wherein it is said:

"The rule of *res adjudicata* is to prevent vexatious litigation and to require the parties to rest upon one decision in their controversy, but where they expressly agree to withdraw an issue from the court the reason for the rule ceases. The issue is not in fact adjudged, and the parties themselves having consented to that method of trial are not entitled to invoke the rule which requires parties to submit their whole case to the court. If they consent to adjudicate their differences piecemeal there is no reason that the court should extend the rules of law to prevent that which they had expressly agreed might be done."

There can be no question but that such is the law. But the rulings of the two cases last cited are founded squarely upon the fact that the issue upon which no finding was made was withdrawn on stipulation from the consideration of that case. In other words, it was reserved for further consideration between the parties. [1] Here a different state of facts exists. The issue of undue influence was not withdrawn. Plaintiff relied upon it and offered proof in support of it, but such proof was excluded by the court upon the ground that the complaint failed to state sufficient facts. Plaintiff accepted the ruling of the court, failed to amend, and did not appeal. In that state of the record we are of the opinion that the position of plaintiff in the present action has not been brought within the rules stated in any of the cases above cited, and that he is concluded by the former

judgment on the issue of undue influence. The fact that the judgment may have been based upon a defective complaint did not render the judgment void (*Gillespie v. Fender*, 180 Cal. 202, [180 Pac. 332]; *Estate of Rose*, 180 Cal. 643, [182 Pac. 752]), nor minimize its effectiveness concerning all issues raised by the pleadings.

[2] The other question involved, briefly stated, is this: Can a party who seeks to set aside deeds commence and maintain against the same parties as many consecutive, independent suits to accomplish that purpose as he has grounds upon which to make the attack? In other words, may he under the law attack the deeds first upon the ground of undue influence, and, if not successful, then commence a second suit against the same parties to set aside the same deeds upon the ground of mental incompetency, or must he embody all of his alleged grounds of invalidity in one action? We are of the opinion that he must embody them all in one action. In *Woolvorton v. Baker*, 98 Cal. 628, [33 Pac. 731], it is held:

"Her cause of action was the breach of the agreement under which she alleged that this conveyance had been made, and involved the determination of the rights of the parties flowing from that transaction, and it was incumbent upon her to set out in her complaint all the facts which constituted this cause of action. She is estopped by the judgment therein rendered from thereafter asserting any cause of action depending upon the facts so omitted, as fully as she would be if at the trial she had omitted to introduce evidence in support of her averments or present argument to satisfy the court of justice of her claim. A party cannot litigate his cause of action by piecemeal, and, after a judgment against him, seek in another action to obtain relief dependent upon the transaction therein adjudged, by bringing forward claims and demands properly belonging to the first action. The judgment against him is conclusive, not only of what was in fact determined, but also of all matters which might have been presented in support of his cause of action and litigated therein. The rule is stated by Vice-Chancellor Wigram in *Henderson v. Henderson*, 3 Hare, 115: 'Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to

that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' (See, also, Wharton on Evidence, sec. 717; 2 Black on Judgments, sec. 729; *Rogers v. Higgins*, 57 Ill. 244; *Stockton v. Ford*, 18 How. (U. S.) 418, [15 L. Ed. 395, see, also, Rose's U. S. Notes]; *Sullivan v. Triunfo M. Co.*, 39 Cal. 464; *Taylor v. Castle*, 42 Cal. 367; *Parnell v. Hahn*, 61 Cal. 131.)"

In *Greer v. Greer*, 142 Cal. 519, [77 Pac. 1106], wherein an action was brought by a wife for divorce, for alleged desertion, and for the cancellation of a deed of the husband to his daughter, a former judgment for the defendant in an action by the wife for maintenance grounded upon the same alleged desertion, and seeking the same relief was held to be *res adjudicata*. The court there said:

"If the deed made by defendant Greer, having been once attacked by plaintiff and found valid by the judgment of a court of competent jurisdiction, can again be attacked by the same plaintiff against the same parties in a different suit, there would be no end to the litigation. The plaintiff might bring a separate action for divorce every year on each of the different causes set forth in the code, and each time claim that she had the right to investigate the validity of the transfer. It is evident that such proceedings might be kept up beyond the lifetime of defendant Greer. It is the rule that when a matter is once fairly before the court and adjudicated between the same parties, involving the same question, it cannot afterward be litigated, even upon grounds not disclosed in the former case. (*Wheeler v. Eldred*, 137 Cal. 37, [69 Pac. 619]; *Bingham v. Kearney*, 136 Cal. 175, [68 Pac. 597].)"

In the *Estate of Harrington*, 147 Cal. 124, [109 Am. St. Rep. 118, 81 Pac. 546], it was held that where a claim of widowhood of a deceased person was litigated upon issue joined upon the petition of the alleged widow for a homestead, and was then determined against her, that she could not afterward litigate the question of her widowhood upon distribution of the estate. The court there said:

"But where an issue of fact vital to the controversy has been tried between parties litigant, and a judgment depending for its sufficiency upon the finding of fact has become final, that determination of fact is forever binding in every court between the parties to that litigation and their privies. Otherwise, as has been repeatedly declared by the courts, there could be no end to litigation. 'If a new action could be commenced and a case retried because of the discovery of new facts after the case had been finally disposed of there would be no end of litigation and a case be kept in court forever.' (*Quirk v. Rooney*, 130 Cal. 505, [62 Pac. 825].) And again: 'If she failed to assert her claim properly or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary.' (*Bingham v. Kearney*, 136 Cal. 175, [68 Pac. 597].) And says Freeman on Judgments (fourth edition, section 260): 'It is sufficient that the status of the action was such that parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. But if either party fails to present all his proofs, or improperly manages his case, or afterward discovers additional evidence in his behalf, or if the court finds contrary to the evidence or misapplies the law—in all of these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice.'"

In Black on Judgments, volume 2, section 754, the rule is stated in the following language:

"A party cannot relitigate matters which he might have interposed but failed to do in a prior action between the same parties or their privies in reference to the same subject matter. And if one of the parties failed to introduce



matters for the consideration of the court that he might have done he will be presumed to have waived his right to do so. If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity the law will not aid him."

Other authorities to the same effect are *Suisun L. Co. v. Fairfield School Dist.*, 19 Cal. App. 587, [127 Pac. 349]; *Curtis v. Upton*, 175 Cal. 322, [165 Pac. 935]; *Flynn v. Hite*, 107 Cal. 455, [40 Pac. 749]; *Crew v. Pratt*, 119 Cal. 139, [51 Pac. 38]; *Estate of Bell*, 153 Cal. 331, [95 Pac. 371].

Even the cases cited by appellant adhere to the same rule, for in *Southern Pacific Co. v. Edmunds*, *supra*, it is said:

"The rule undoubtedly is that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided."

There are several grounds upon which a deed may be set aside under the law. Among them are fraud, undue influence, mental incompetency, duress, menace, etc. If a party is allowed to urge one ground at a time, or even all grounds except one or two, it would result in piecemeal and endless litigation, which, as we have seen from the authorities above cited, the law seeks to avoid.

The sole object of plaintiff's first action was to obtain an adjudication by a court of competent jurisdiction that the deeds were void. In that action he should have urged all the grounds upon which he claimed the invalidity existed, and if he did not do so the law, as we have seen, will not allow him to commence another action against the same parties to litigate the same controversy.

In view of the fact that plaintiff's action is barred by the former judgment, the other questions involved in the appeal are immaterial.

Judgment affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 3180. First Appellate District, Division One.—April 6, 1920.]

**HENRY MILLIKEN, Respondent, v. ALVINA VALENCIA  
et al., Appellants.**

- [1] **QUIETING TITLE—OWNERSHIP OF INTEREST IN TRUST—PLEADING—PROOF.**—In an action to quiet title against an execution levied on the property, the execution having issued in an action in which judgment was rendered against a brother of plaintiff, the defendants are precluded from offering proof that plaintiff holds an undivided one-half interest in the property in trust for such brother, where they do not plead a trust or any other equitable interest, but merely allege that such brother is the owner of an undivided one-half interest in the property.
- [2] **ID.—AMENDMENTS DURING TRIAL—DISCRETION—APPEAL.**—The allowance of amendments during the trial is a matter largely in the discretion of the trial court, and the ruling of the trial court will not be disturbed unless an abuse of discretion is clearly shown.
- [3] **ID.—AMENDMENT ALLEGING TRUST RELATIONSHIP—DENIAL OF LEAVE.**—Where the pleadings in an action to quiet title consist merely of an allegation of ownership by plaintiff and a denial by the defendants, the sheriff, and a judgment creditor of a brother of plaintiff of such ownership, accompanied by an allegation that said brother of plaintiff is the owner of an undivided one-half interest in the property, it is not error to refuse the defendants leave to amend during the trial so as to permit the introduction of proof that plaintiff holds an undivided one-half interest in the property in trust for said brother.

**APPEAL** from a judgment of the Superior Court of Riverside County. W. H. Thomas, Judge. Affirmed.

The facts are stated in the opinion of the court.

Meserve & Meserve and Richard L. North for Appellants.

Miguel Estudillo and Sarau & Thompson for Respondent.

**KNIGHT, J., pro tem.**—This is an appeal by defendants from a judgment quieting title in plaintiff in and to certain tracts of land situate in Riverside County. The complaint alleges ownership in plaintiff, and further alleges that the

defendant Frank P. Wilson, as sheriff of Riverside County, levied an execution on said property, issued in an action wherein Alvina Valencia, one of the defendants herein, obtained a money judgment against Phillip Milliken, a brother of plaintiff herein. The answers of the defendants Wilson and Valencia on information and belief denied plaintiff's title, and on information and belief alleged that said Phillip Milliken was the owner of an undivided one-half interest in said property. In support of his complaint plaintiff offered proof showing beyond question that he was the owner of the legal title to said property. [1] Defendants then attempted to prove a state of circumstances which they claimed would show that plaintiff, Henry Milliken, held an undivided one-half interest in said property in trust for his brother, Phillip Milliken. Plaintiff objected to this character of testimony upon the ground that defendants had not pleaded a trust or any other equitable interest, and that they were therefore precluded from offering such proof. The court properly sustained the objection. (*Robinson v. Muir*, 151 Cal. 118, [90 Pac. 521].) Thereupon defendants asked leave to amend their respective answers so as to set forth such trust relation, but their application was denied by the court upon the ground that the allowance of such amendments would be adding an entirely new issue to the case. Notwithstanding the ruling of the court, much conflicting testimony of an asserted trust relation was injected into the record.

Appellants now contend that the court erred in disallowing defendants' proposed amendments, and that it "erroneously found that Henry and not Phillip was the owner of the properties in question, and in holding that Phillip had no interest therein subject to execution levy when the levy here in question was made."

[2] The allowance of amendments during trial is a matter largely in the discretion of the trial court (sec. 473, Code Civ. Proc.), and it has been repeatedly held that the ruling of the trial court will not be disturbed unless an abuse of discretion is clearly shown. (*Billesbach v. Larkey*, 161 Cal. 649, [120 Pac. 31]; *Brittan v. Oakland Sav. Bank*, 124 Cal. 282, [71 Am. St. Rep. 58, 57 Pac. 84]; *In re Redfield's Estate*, 116 Cal. 637, [48 Pac. 794].) [3] We are satisfied that the reason assigned by the trial court for its

ruling in denying leave to amend is sound, and furthermore, that the amendments themselves as proposed were wholly insufficient to raise the question of the trust relation, because they utterly failed to state any facts showing that relation, merely alleging on information and belief the conclusion "That Henry Milliken, plaintiff herein, holds an undivided one-half interest in all of said real property in trust for said Phillip Milliken."

The pleadings, then, as they stood during the trial and at the time of the entry of judgment, consisted merely of an allegation of ownership by plaintiff, and a denial by defendants of such ownership, accompanied by an allegation that Phillip Milliken was the owner of an undivided one-half of said property. In that state of the pleadings the evidence of a trust relation or of an equity in Phillip Milliken was properly ignored by the court in its findings, and even if proved would not have permitted a judgment in defendants' favor to that effect.

The situation here is similar to the one presented in *Reilly v. Wright*, 117 Cal. 77, [48 Pac. 970], wherein the court said: "The other questions presented all grow out of an attempt on the part of the defendants to show an equitable title in defendant Wright, which was not pleaded. The whole matter was entirely without the issues raised by the pleadings, and while the court admitted evidence upon the question, it eventually and, we think, properly entirely ignored such evidence in making its findings, and confined itself to the issues made by the pleadings." In the later case of *Robinson v. Muir*, *supra*, it is held: "Where the defense consists merely of a denial of plaintiff's ownership and the assertion of title in defendant, such defense is not established by proof that the plaintiff is the owner of the legal title subject to an equity in favor of defendant."

Judgment affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 3267. First Appellate District, Division Two.—April 7, 1920.]

ETHEL D. BERRY, etc., Appellant, v. L. COHN et al.,  
Respondents.

[1] **ADVERSE POSSESSION—USE OF UNINCLOSED LAND FOR GRAZING.**—The exclusive use of uninclosed land for grazing during the grazing season may constitute adverse possession.

[2] **ID.—ACTION TO QUIET TITLE—EXCLUSIVE AND OPEN POSSESSION—EVIDENCE.**—In this action to quiet title to certain uninclosed land, the evidence as to the use of the land by defendants' lessee during a portion of each year for the statutory period of years, coupled with the testimony of such lessee, who lived on the adjoining land, that the land in controversy was not occupied by anyone else during the period it was not in use by him, was sufficient to support the finding of the trial court that the defendants had maintained an exclusive and open possession for the statutory period.

[3] **ID.—AUTHORITY OF BROTHER TO ACT AS AGENT—EVIDENCE.**—In such action, the evidence having shown that the land was purchased at a tax sale by one of the defendants for the other defendant, a brother, that the former was the general agent to transact all kinds of business for the latter in the county, that as such agent he rented the property for the latter and paid all taxes on the property from the time of its purchase at the tax sale until the latter conveyed the property to him, such evidence, taken in connection with the ratification contained in the deed and the inferences which could properly be drawn from the entire evidence, was sufficient to justify the conclusion of the trial court that the defendant to whom the property was conveyed was authorized to represent his brother to the extent that adverse possession might be acquired through such agency.

**APPEAL** from a judgment of the Superior Court of Kern County. J. W. Mahon. Judge. Affirmed.

The facts are stated in the opinion of the court.

Everts & Ewing, M. G. Gallaher and Wm. E. Simpson  
for Appellant.

Kaye & Siemon for Respondents.

NOURSE, J.—Plaintiff appeals from a judgment rendered against her in an action to quiet title to real property in Kern County. The defenses relied upon by defendants were that title had been acquired, first, by tax deed to L. Cohn in August, 1904; and, second, by adverse possession under color of title. On the trial it was stipulated that plaintiff was the owner and in possession of the property at the time of the tax sale, and that she had not divested herself of her interest or title therein by any conveyance executed since that date. The trial court found that the tax deed under which defendants claimed title was void for the reason that the property was sold to the state and thereafter by the state to L. Cohn for a less amount in each instance than provided by law. The judgment quieting title in C. Cohn was based upon the second defense, which is the only one to be considered upon this appeal.

On August 13, 1904, the tax collector of Kern County executed a deed of the property involved in this action to defendant L. Cohn. In May, 1914, L. Cohn, by quitclaim deed, conveyed to defendant C. Cohn. The affairs of L. Cohn with relation to the purchase and occupation of this land were conducted by C. Cohn, the latter claiming to have acted as agent for the former.

Appellant contends that the judgment based upon the conclusion of the trial court that title to the land in question is vested in C. Cohn by reason of adverse possession is erroneous because: First, the evidence does not sustain the finding that the possession of C. Cohn was hostile, exclusive, continuous, and uninterrupted; and, second, there is no showing that the acts of C. Cohn claimed to have been done by him as the agent of L. Cohn, and so relied upon as constituting adverse possession by L. Cohn, were done with the knowledge or consent of L. Cohn or under any authority to perform those acts.

All taxes were paid by C. Cohn from the date of the tax deed to L. Cohn to the commencement of this action on October 5, 1917. The land was not personally occupied by either of the Cohns, but was rented to other parties by C. Cohn on behalf of L. Cohn prior to the conveyance of 1914 and thereafter by C. Cohn in his own behalf. C. Cohn testified that prior to 1907 or 1908 he rented the land to one John Maio, who did not himself occupy it, he being in the

business of re-renting to others for sheep-grazing purposes. There is no evidence to indicate the date it was so rented to him, the length of the lease, or the use to which it was put during that period. Maio's tenancy need be given no further consideration, as there can be no doubt that the evidence offered with regard to it failed to meet the requirements for adverse possession. In 1908 C. Cohn rented the land to J. B. Raymond. From that time until the trial, to which time his tenancy continued, the adverse possession of the land by defendants is founded solely upon its occupancy by Raymond. Occupation of the land by Raymond consisted in its use for sheep-grazing purposes only. The land was uninclosed and formed part of a large open tract. Raymond testified that he rented the land from C. Cohn and went there the first of January, 1908, remaining until April; that some years he took sheep there in the summer for dry feed which he had stored upon the land—"maybe a couple of times every five or six years"—but in the ordinary years he pastured his sheep upon the land as soon as the fall rains started the green feed, and used all the feed that grew on the land (pasturing one thousand five hundred or two thousand sheep there for two or three months each year), and that he then took his sheep and left the place entirely. He also testified that he had five or six sections of land, including the half section involved herein, upon which his sheep grazed; that they were not impounded by a fence or in any other way; and that two or three months covered the time spent upon the entire tract and not the time spent upon the Cohn half section alone. The evidence shows that each year he had a sheep corral on this particular half section, sometimes a tent for the herders, and that on some occasions he left a man on it to guard the dry feed when he took his sheep to other pastures. Raymond knew the boundaries of the land in question and testified that during the time he was on the land each year no other sheep grazed on it and it was not used by anyone else for any purpose. The witness Reynolds was produced by respondents and testified that, so far as he was aware, no one else used the land during Raymond's absence. His testimony developed the fact that he lived with his family on a tract of land adjoining the half section from 1910 to the date of the trial, and that, though he was away from that vicinity during a portion of

the period referred to, he returned to his home two or three times each week and often remained for two weeks at a time.

The foregoing are the facts relied upon by respondents for the purpose of showing adverse possession. [1] The exclusive use of uninclosed land for grazing during the grazing season may constitute adverse possession. (*Webber v. Clarke*, 74 Cal. 11, 18, [15 Pac. 431].) There is no conflict in the evidence as to the use made by respondents. But the additional burden was on them to prove that the land was not occupied by anyone else during the nine or ten months each year it was admittedly not in use by them. (*Cory v. Hotchkiss*, 31 Cal. App. 443, 447, [160 Pac. 841]; *Saecker v. Cohn*, 180 Cal. 151, [179 Pac. 890].)

[2] In this respect respondents were required to prove a negative. No evidence of any character was offered by appellant even suggesting possession or user during any portion of the period of twenty years she had failed to pay any taxes upon the property. The witness Raymond did testify that during the period of his lease, 1908-18, no one else used or occupied the land during the pasturing season except his sublessee during the season of 1917. The witness Reynolds testified that, with the exception of the same sublessee, the land had not been occupied or used by anyone other than respondents' lessee for any other purpose since 1910. This witness lived on the land adjoining that in controversy and was, apparently, the one having the best knowledge of the occupancy of the land.

The evidence of adverse possession differs materially from that considered in *Cory v. Hotchkiss*, *supra*, and *Saecker v. Cohn*, *supra*, and brings the case squarely within the rule of *Webber v. Clarke*, *supra*. The evidence, though meager, is sufficient to support the finding of the trial court that respondent had maintained an exclusive and open possession for the statutory period.

[3] Appellant also argues that the evidence is insufficient to support the conclusion that C. Cohn was authorized to represent his brother to the extent that adverse possession might be acquired through such agency. But the evidence is that the land was purchased by C. Cohn in the name and on behalf of his brother; that C. Cohn was a general agent to transact all kinds of business for his brother in Kern County; that as such agent he rented this property for his



brother and paid all taxes on it for him since 1904 and until 1914, when the brother by deed conveyed the property to him. This testimony was received in evidence without objection and, taken with the ratification contained in the deed of the principal and the inferences which could properly be drawn from the entire evidence, was sufficient to support the finding.

The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 3, 1920.

Angellotti, C. J., Shaw, J., Lawlor, J., Wilbur, J., Olney, J., and Sloane, J., concurred.

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[Civ. No. 2556. Second Appellate District, Division One.—April 7, 1920.]

DON LEE, Appellant, v. J. DE LA MOTTE et al., Respondents.

[1] OPTION — REPURCHASE OF AUTOMOBILE — TIME OF EXERCISE.—

Where in connection with the purchase of an automobile the purchaser turns over to the dealer an automobile which he then owns, which it is agreed is to be held by the dealer for thirty days at a price to net the purchaser a given amount, and if not sold in thirty days the purchaser has the option to buy it back for a specified amount plus repairs put on it, the purchaser cannot be called upon to exercise his option to repurchase the machine immediately upon the expiration of the thirty days, but must be deemed to have been allowed a reasonable time thereafter within which to exercise that option; and the exercise of such option forty-five days after the option period had commenced to run was within a reasonable time where at that time the repairs on the car were not fully completed.

[2] CLAIM AND DELIVERY—CONDITIONAL SALE OF AUTOMOBILE—OWNERSHIP—RIGHT OF POSSESSION—FINDINGS.—In this action in claim and delivery to recover possession of an automobile sold by plain-

tiff to defendant under a contract of conditional sale, wherein the title to the car was expressly reserved in plaintiff until the automobile was completely paid for, while a finding that defendant was entitled to possession of the automobile was authorized, a finding that plaintiff was not the owner of the automobile was unsupported by the evidence.

- [3] **ID.—CLAIM OF RETURN OF PROPERTY—INSUFFICIENCY OF ANSWER.** Where the answer, in an action in claim and delivery in which the property has been delivered to the plaintiff, does not claim a return of the property, such answer is insufficient to support a judgment for its return.

**APPEAL** from a judgment of the Superior Court of San Diego County. S. M. Marsh, Judge. Reversed.

The facts are stated in the opinion of the court.

W. R. Law for Appellant.

Henning & McGee and J. De La Motte, *in pro. per.*, for Respondents.

**JAMES, J.**—Action in claim and delivery for the recovery of possession of a certain automobile or its value, which latter was alleged in the complaint to be the sum of \$850, together with damages. Defendants had judgment, from which plaintiff has appealed.

In addition to determining that the plaintiff was neither the owner nor entitled to the possession of the automobile in question, the trial court found that the plaintiff had preliminarily obtained the possession of the automobile through the sheriff, and by the judgment directed that the defendants have possession of the same, or recover the value thereof, which was fixed at the same sum alleged by the plaintiff, to wit, \$850. The appellant's points may be summarized under two heads: (1) That the evidence was insufficient to support the finding against the ownership or right to the possession of the automobile in the plaintiff; (2) that under the pleadings the judgment directing the return of the automobile to the defendants was unauthorized. A consideration of the first point involves an examination of the main facts of the case as shown by the evidence. Necessarily, in considering the findings as made by the trial court, the evidence introduced on behalf of the plaintiff

must be considered in its strongest light. As defendant De La Motte appears to have been the actual contracting party in the transaction about to be described, we will hereinafter refer to him as the defendant. Defendant Millais, it seems, had possession of the automobile at the time this controversy arose, but her possession was derived from De La Motte and no question is made but that De La Motte was the party responsible to the plaintiff.

On the seventeenth day of November, 1916, plaintiff made a contract of conditional sale whereby he agreed to sell to the defendant a used automobile for the sum of \$850. The contract of sale, signed by both parties, acknowledged the receipt of \$450 on account, and provided that payments should be subsequently made, to wit: seventy-five dollars on December 17, 1916, and sixty-five dollars on the seventeenth day of each of the five months immediately following. It was provided that interest at the rate of eight per cent per annum should be paid by the vendee. In conjunction with this contract, promissory notes covering the deferred payments and corresponding to the terms of the contract as to amounts and due dates were made. As a matter of fact, the initial payment of \$450, which the contract acknowledged, was not a cash payment, but was a credit which the plaintiff agreed to allow in consideration of the delivery to him by defendant of another used automobile. In other words, the transaction took the form of a partial exchange of automobiles. As a part of the transaction, however, an additional agreement was made, evidenced by the following written term: "Studebaker car [that being the car delivered by the defendant to the plaintiff], to be held for 30 days at a price to net purchaser \$650, if not sold in 30 days purchaser has option to buy Studebaker for \$500 plus repairs put on it." The automobile received from the defendant was not sold within the thirty days by the plaintiff, but was sold on the sixth day of January, 1917, for the sum of \$750. Prior to this time, and while the machine was in the hands of the plaintiff, extensive repairs had been made upon it. The installment which fell due on December 17th of seventy-five dollars, by the terms of the contract as hereinbefore stated, was paid by the defendant. The installment due on January 17, 1917, which, as will be noted, was ten days after the automobile delivered by the defendant to the plain-

tiff had been sold, was not promptly paid; that is, on January 25, 1917, defendant forwarded to the bank which was making collection of the notes a check for sixty-five dollars, but did not include the small amount of interest due, claiming that he had been overcharged on the interest account. On the same date he wrote to the plaintiff as follows: "I have been waiting for you to make a settlement of my account on the sale of the Studebaker car which you sold for the sum of \$750. I have to-day sent to the bank a check for the sum of sixty-five dollars and a request that they correct their account with me on account of an overcharge on the interest on all of the notes they have collected, which I have no doubt they will do. I will turn over the car to you if you wish, upon your turning over to me the Studebaker car, or upon the payment to me of the amount of money paid for the same. I think that it is usual under circumstances like that which now exists between us, to at least notify me of the fact that the car was sold and what was paid for the same, so that I would know what was coming to you on that account. I desire a complete statement of the account before the next payment is made." On January 26th the check was returned to the defendant by the bank with the suggestion that the matter of any offsets be taken up with the plaintiff directly. About the 1st of February defendant appeared at the place of business of the plaintiff and found that the car which he had delivered in part payment was still in the shops of plaintiff, and that the repair charges in full, as stated to him by the plaintiff, amounted to \$204; he testified that the manager of plaintiff asked him whether he desired to exercise his option to purchase the car, and that he (defendant) stated that he would so exercise the option, but that on the following morning the same manager told him that the car had been sold and that he could not have it. The defendant demanded that a credit of \$650 be given him on his account, instead of \$450, which credit, if it had been made, would have more than satisfied the installment notes both for the January and February payments. Under the terms of the contract the defendant had no option to repurchase the Studebaker car until the 17th of December, 1916, or thirty days after the contract was entered into; the plaintiff, within the first thirty days, was required, if he sold the machine, to sell it for a price that

would produce for the defendant a credit of not less than \$650. [1] Defendant could not have been called upon to exercise his option to repurchase the machine immediately upon the expiration of the thirty days, but must be deemed to have been allowed a reasonable time thereafter within which to exercise that option. Furthermore, certain repairs had been undertaken to be made by the plaintiff on the machine and these repairs were not completed at the end of the thirty days, and in fact were not completed at the time the defendant had his further dealings with the manager of the plaintiff in February, when, for the first time, the cost of the repairs was calculated and stated to him. This latter date was approximately forty-five days after the option period had commenced to run. In view of the fact that the repairs had not been completed and no statement of the same made to the defendant, we think it just to hold that a reasonable time had not elapsed subsequent to the expiration of the first thirty days at the early date in February to which we have referred. That being true, and as it appears that the defendant manifested his desire to repurchase at that time, and the fact being that the machine had been sold on the sixth day of January by the plaintiff, we think that defendant was entitled to have credited the amount received from the sale of the automobile, less the repair costs as they were stated to him, and less fifty dollars, that being the difference between the \$450 mentioned as a credit in the contract and the amount for which the defendant was to be permitted to repurchase. If there was no other point to be considered in the case we might easily determine that these implied findings were made by the court. [2] The finding that the plaintiff was not the owner of the automobile, possession of which was sued for herein, finds no support in the evidence, although the more material finding that the plaintiff was not entitled to possession of the same is, for reasons already appearing, sufficiently sustained. As to the ownership being in the plaintiff contrary to the finding, the written contract particularly and expressly reserved title in the plaintiff until the automobile purchased by the defendant from him was completely paid for. Under any view of the evidence, it does not appear that the purchase price had been satisfied at the time this action was brought. However, upon a retrial, which it seems is necessary to be had,

different findings may be arrived at. [3] Defendant did not, in his answer, claim the right to have the automobile, taken under claim and delivery process, returned to him. Section 667 of the Code of Civil Procedure, relating to judgments in this kind of action, declares: "If the property has been delivered to the plaintiff, and the defendant *claim* a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." Defendant did, by way of counterclaim, show the fact that the automobile had been taken from his possession by the sheriff at the instance of the plaintiff, and alleged certain damages which he had sustained by reason of such act. In his prayer for judgment he made no demand whatsoever for the redelivery of the automobile, his answer, after enumerating damages, concluding with the following words: "for which sum, together with the costs and disbursements of this action, defendant asks judgment; and that the plaintiff take nothing by his action, and that plaintiff's action be dismissed with costs." Under the authorities, this answer is insufficient to support a judgment for the return of the property. (*Pico v. Pico*, 56 Cal. 453; *Banning v. Marleau*, 101 Cal. 238, [35 Pac. 772].) In *Pico v. Pico*, *supra*, the court points out that ordinarily in an action of replevin where the issue is made as to the right of the plaintiff to the possession of the property and the facts showed that the defendant was entitled to that possession, a judgment for the return of the property to the defendant was permissible. However, attention is called to the fact that the code section above cited requires something more: "Nevertheless, a defendant cannot have judgment for a return of the property or its value, unless he has claimed a return in his answer. But this, even if it be held to require a formal demand, is not because such demand is necessary to eke out the denials, or constitutes of itself an affirmative allegation, but because it is arbitrarily made the duty of defendant to assert his formal claim for a return as a prerequisite to a judgment for the return of the property or its value. Except for this arbitrary requirement of the statute, the formal claim for a return of the property would not be necessary. We have seen that where the facts set forth in a plea of replevin showed that defendant was entitled to the possession of the

property when the action was commenced, a formal claim or demand for a return was not essential. In reference to replevin, courts and legal writers have said that a defendant was entitled to a judgment for a return whenever the question, whether a return should be had, was presented by the pleadings; that is, whenever the right of plaintiff was contested, and the right of possession in defendant, or a third person, asserted. Under our system, the general denial contests the right of plaintiff, and under it may be shown the right of defendant or a third person. The denial of plaintiff's right to the possession necessarily includes an assertion of right in defendant, from whom the possession of the property has been taken under the writ; and would authorize a judgment for the return, *were it not for the provision of the code which requires a return to be claimed in the answer.*" We are not permitted to assume, under the record as it is presented, that the plaintiff tacitly agreed that a judgment for the defendant for the return of the property would be made. The evidence introduced was pertinent to a claim for damages, which is all that defendant seems to have sought by his answer.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

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[Civ. No. 8155. First Appellate District, Division One.—April 7, 1920.]

**JAMES F. SHEEHAN, Respondent, v. BOARD OF POLICE COMMISSIONERS, etc., et al., Appellants.**

[1] **MUNICIPAL CORPORATIONS—SAN FRANCISCO—POLICE PENSION FUND—VESTED RIGHTS—MANDAMUS.**—A police officer of the city and county of San Francisco, upon proof of his disabilities, having been regularly granted a pension, pursuant to the provisions of section 3 of article VIII, chapter 10, of the charter, has a vested right to retain his place upon the retired list and to have his pension continued until his disabilities shall have ceased; and, so long as his disabilities continue, he is entitled to a writ of mandate to compel the board of police commissioners, acting as a board of police relief and pension fund commissioners, to main-

tain him in said position as a retired patrolman and to continue to pay his pension.

- [2] **ID.—TERMINATION OF DISABILITY—JURISDICTION OF BOARD—VOID ORDERS.**—After a police officer of the city and county of San Francisco is thus regularly granted a pension, the attempted action of the board of police commissioners, acting in the capacity *ex officio* of a board of police relief and pension fund commissioners, in declaring that his disabilities have ceased without any proof or showing upon the subject, and in the face of the practically undisputed fact that his disabilities have not ceased, is beyond their charter powers, and their attempted acts in so declaring and in seeking to compel him to report for duty as a patrolman, and in ordering his dismissal from the department for alleged insubordination in refusing to obey its order to so report to duty, are each and all void.
- [3] **ID.—REMEDIES — CERTIORARI — MANDAMUS.**—That petitioner may have had also the right to apply for a writ of review to test in that form of limited inquiry the jurisdiction of the board of police commissioners to make its said several orders, cannot be held to have deprived him of his larger and more fully effective remedy by way of a writ of mandate.
- [4] **ID.—DEMANDS FOR PENSION WARRANTS—COMPLIANCE WITH CHARTER.**—The charter of the city and county of San Francisco having required that all claims against the pension fund be passed on by the board of police relief and pension fund commissioners, who should issue warrants to the persons entitled thereto, and the petitioner having made repeated demands upon the said board for the issuance of his pension warrant, which demands were refused, his right to recover accrued pension was not barred because he had not complied with the provision of section 1 of article III, chapter 4, of the charter, requiring the presentation of all claims upon the treasury of said municipality to the auditor and treasurer thereof within a limited period after the demand became due and payable.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge. Affirmed.

The facts are stated in the opinion of the court.

George Lull, City Attorney, and Chas. S. Peery, Assistant City Attorney, for Appellants.

Charles J. Heggerty and Knight & Heggerty for Respondent.



RICHARDS, J.—This is an appeal from a judgment in the plaintiff's favor in a proceeding wherein he sought and obtained a writ of mandate requiring the defendants, as the board of police commissioners of the city and county of San Francisco, to restore said plaintiff to the position of a police officer of and in the police department of the said municipality, and also to restore the plaintiff to the pension-roll of the police and pension fund of said department, and to pay to said plaintiff his accrued pensions as a retired police officer, amounting to the sum of four thousand six hundred dollars.

The facts of the case are embraced in the findings of the court which may be summarized as follows: The plaintiff was appointed a police officer of the police department of the city and county of San Francisco on September 20, 1895, and continued in active service as such police officer until August 1, 1899, when he was injured in the performance of his duty by being thrown from a horse which he was breaking to the saddle under the orders of his superior officer, and which said horse fell upon him, causing severe injuries to his head and side, resulting in a total deafness in his right ear and injuries to his brain, producing recurring epileptic convulsions. Thereafter the plaintiff presented to the said board of police commissioners his verified petition, accompanied by suitable certificates and recommendations, requesting his retirement upon a pension on account of his disabilities, which his examining physician certified to be permanent. The said board on October 6, 1903, made its order granting said petition to the effect that the plaintiff should be retired from further service in the police department until his disabilities should cease, and that he be paid from the police and pension fund of said police department a yearly pension of six hundred dollars, being one-half the amount of salary attached to his rank as a patrolman in said department at the time of his said injuries. On January 11, 1904, the said board of police commissioners, who are also *ex officio* the board of police relief and pension fund commissioners, caused a subpoena to be issued and served upon the plaintiff requiring him to appear before them on the afternoon of said day, and show cause why he should not be restored to active duty on the

ground that his said disabilities had ceased. The plaintiff appeared at the time appointed in response to said subpoena, whereupon he was informed by said board that it had been reported to it that the plaintiff had been for some time prior thereto in the employ of the United Railroads of San Francisco in a professional capacity, viz., that of an attorney at law. The plaintiff admitted that since his retirement from active duty as a police officer he had become an attorney at law and was employed as such by the United Railroads, but stated that his disabilities for service as a police officer had not ceased and that he was still unable to perform the duties of a patrolman in the department; and he then applied for a hearing before said board upon a day set when he could produce witnesses and prove his continuing disability for such service. The board of police commissioners refused this application and, thereupon, sitting as a board of police relief and pension fund commissioners, ordered the plaintiff to report on January 12, 1904, to Dr. O. W. Jones, the police surgeon, for the purpose of physical examination, and to further report to said board at their regular meeting to be held in the evening of the last-named day. The plaintiff endeavored to comply with this direction as to his examination by the police surgeon, but the latter refused to set a date for said examination earlier than January 15, 1904, at which time the plaintiff was to appear to be examined by him. On the evening of January 12, 1904, the plaintiff appeared before said board, sitting as police relief and pension fund commissioners, according to their direction, and informed them of his inability to procure said examination by the police surgeon before January 15, 1904, and requested a postponement of his matter until that time. This request was refused and an immediate hearing ordered to be proceeded with, to which the plaintiff objected upon the ground of the shortness of the time, the absence of his attorney to represent him, and of his witnesses, and requested a continuance until he could procure the attendance of these. This request the board also denied, and thereupon proceeded, without any further hearing or trial or investigation, and without any examination of the facts of the case, to pass a resolution purporting to restore the plaintiff to active duty in the police department of the city and county of San Francisco as a patrolman, and to

order the plaintiff to report to the chief of police on the following day for assignment to active duty as such. Plaintiff did not report to the chief of police in accordance with said order, and thereupon charges of insubordination were presented by the chief of police to said board of police commissioners for the plaintiff's said failure to report for active duty. These charges were set for hearing by and before the board of police commissioners for January 26, 1904, and came on for hearing on the evening of said day, whereupon plaintiff appeared and objected to said proceedings upon the ground of want of jurisdiction in the said board to make their said order restoring him to active duty, and hence of a want of jurisdiction in them to try him upon the charge of insubordination for any disobedience of said former order. The board of police commissioners overruled his said objection, and at once proceeded to find the plaintiff guilty of insubordination and to dismiss him from the department. The plaintiff thereafter demanded of said board that they vacate and set aside their said several resolutions, and also repeatedly demanded his restoration to the pension-roll as a retired police officer and the payment of his accruing pension as such. All of these demands were refused, whereupon the plaintiff instituted this proceeding in *mandamus* to compel his restoration and reinstatement as a retired police officer, and also to compel the payment of his accrued and accruing pensions as such. He also instituted a proceeding in the nature of a writ of review to have annulled the aforesaid orders of the board of police commissioners for want of jurisdiction in the board to make the same. Upon the hearing of the plaintiff's petition for a writ of mandate in this case it was affirmatively made to appear that the plaintiff's disabilities which had led to his original retirement from active service in the department had not ceased but still existed, and that by reason thereof the said plaintiff continued to be unable to perform active duty as a patrolman in said department. It was also conceded at the trial that there was at all times in the police relief and pension fund sufficient money to have paid the plaintiff's pension if he should be found entitled to the same.

Upon the foregoing facts as found by the trial court it rendered its judgment in the plaintiff's favor, directing a

writ to issue as prayed for, and from such judgment the defendants have prosecuted this appeal.

[1] The charter of the city and county of San Francisco provides in section 3, chapter 10, article VIII thereof, that:

“Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty upon filing with the commissioners a verified petition setting forth the facts constituting such disability and the cause thereof, accompanied by a certificate signed by the chief of police, the captain of the company to which he belongs, and by two regularly certified physicians of the city and county recommending his retirement upon a pension on account of such disability, may be retired from the department, upon an annual pension equal to one-half the amount of salary attached to the rank which he may have held three years prior to the date of such retirement, to be paid to him during his life and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service, in the rank he occupied, at the time of his retirement.”

In the case of *Kavanagh v. Board of Police Pension Fund Commrs.*, 134 Cal. 50, [66 Pac. 36], it was held that a person entitled to a pension from the police pension fund of the police department of the city and county of San Francisco had a vested right to such pension which could not be taken away by subsequent changes in the charter. It is true that this ruling was made in the construction of a former statute creating a police pension fund in said municipality (Stats. 1889, p. 56); but the supreme court, in the case of *French v. Cook*, 173 Cal. 126, [160 Pac. 411], points out that the provisions of the present charter of the said city and county are so far similar to those of the earlier statute as to justify the application of said former case to the charter in its present form. The plaintiff herein having been regularly granted his pension upon proof of his disabilities had, therefore, a vested right to retain his place upon the retired list and to have his pension continued until his disabilities should have ceased. This being so, the plaintiff, so long as his disabilities continued, would have been entitled to a writ of mandate to compel the board of police commissioners, acting as a board of police relief and pension fund commis-

sioners, to maintain him in said position as a retired patrolman and to continue to pay his pension. (*French v. Cook, supra.*) In the case last above cited the supreme court points out that there is no provision in the present charter of San Francisco confiding to the board of police commissioners, acting in any of its capacities, the power to finally determine any question of fact in connection with such a pension. "The board is apparently in the same position," says the court, "with relation to such matter as is any officer required by law to do a prescribed act in a certain contingency, where no special method is provided by law for the ascertainment of the facts. Under such circumstances it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose. If not satisfied as to the evidence of the essential facts he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in reality such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of county or city auditor, in so far as any finality to its conclusions are concerned. . . . As we read the charter it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense. It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and the cases cited in which it was substantially held that the statute was to be construed as submitting the question to the decision of the board or officer. To hold in accord with defendants' claim in this

connection would be, as we read the charter, to hold that any officer authorized and required by law to do a prescribed act upon a prescribed contingency, where no method is specially provided for the ascertainment of the facts, is invested with the power to judicially determine the facts, and that his conclusion is a judicial determination as to the facts. Such has never been declared to be the law."

[2] Giving to this language of the supreme court full force and effect in its application to the facts of this case, we are constrained to hold that the attempted action of the board of police commissioners, acting in the capacity *ex officio* of a board of police relief and pension fund commissioners, in declaring that the plaintiff's disabilities had ceased without any proof or showing upon the subject, and in the face of the practically undisputed fact, as shown by the trial of this case, that the plaintiff's disabilities had not ceased, was entirely beyond their charter powers, and hence that their attempted acts in so declaring and in seeking to compel the plaintiff to report for duty as a patrolman, and in ordering his dismissal from the department for alleged insubordination in refusing to obey its order to so report for duty, were each and all void. Being so, the plaintiff had a right to a writ of mandate to compel said board to reinstate him in his position as a retired police officer and to compel the payment of his pension.

[3] That he may have had also the right to apply for a writ of review to test in that form of limited inquiry the jurisdiction of the board to make its said several orders cannot be held to have deprived him of his larger and more fully effective remedy by way of a writ of mandate. We are, therefore, of the opinion that the trial court was correct in holding upon the practically undisputed facts before it that the plaintiff was entitled to such a writ.

[4] As to the appellants' contention that the plaintiff, conceding his right to his writ restoring him to his place upon the retired list, is not entitled to that portion of the relief granted as gives him the right to recover his accrued pension for the reason that he was not shown to have complied with section 1, chapter 4, article III of the charter, requiring the presentation of all claims upon the treasury of said municipality to the auditor and treasurer thereof within a limited period after the demand became due and

payable, we are of the opinion that this contention has no merit. We are cited to the case of *Geimann v. Board of Police Comms.*, 158 Cal. 748, [112 Pac. 553], as supporting the appellants' contention in this regard; but we think a clear distinction exists between that case and the case at bar since, as pointed out in that case, the plaintiff therein was urging a salary claim as a police officer which did not require approval by the board of police commissioners before presentation to the auditor in accordance with the requirements of the section of the charter above referred to; while in the instant case the charter (sec. 9, c. 10, art. VIII) specifically requires that claims against the pension fund shall be passed on by the board of police relief and pension fund commissioners, who shall issue warrants to the persons entitled thereto. It is clear that until the person entitled to such pension had received from that body his warrant he could not have applied to the auditor or treasurer of the municipality for the payment of his claim. The undisputed proofs in this case show that the plaintiff made repeated demands upon the said board for the issuance of his pension warrant, which demands were refused. He could not do more under the charter, and hence was entitled to a writ of mandate compelling the action of said board in this respect also.

Judgment affirmed.

Waste, P. J., and Gosbey, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 3, 1920.

Angellotti, C. J., Wilbur, J., Lennon, J., and Sloane, J., concurred.

Shaw, J., Lawlor, J., and Olney, J., dissented.

[Civ. No. 2081. Third Appellate District.—April 8, 1920.]

H. B. KELLEY, Respondent, v. MAX GOLDSCHMIDT  
et al., Appellants.

- [1] **GUARANTY—ACTION ON—NATURE OF.**—A guaranty is an independent contract—that is, it is entirely independent of any contract of debt the payment of which is thus assured—and an action on a guaranty of payment of a note is upon an independent contract of the guarantor with which the principal debtor has nothing to do.
- [2] **ID.—SEVERAL SECURITIES FOR SAME OBLIGATION—CONTRACT OF SURETY—RIGHT OF CREDITOR.**—A mortgage or a trust deed given to secure the performance of an obligation to pay money and a guaranty given for the same purpose are each intended to subserve the same purpose, and where both are given to secure one single obligation of that character, the one operates merely as additional security to the other, and the creditor may resort either to the one or the other to enforce the payment of the money to secure the payment of which both were given; but in the case of a contract of surety executed to secure the performance of the obligation which is also secured by a mortgage or other collateral security, the holder of the mortgage or other security is compelled to apply to the payment of the debt the property of the debtor which has been mortgaged to secure the debt.
- [3] **ID.—SECURITY FOR PAYMENT OF DEBT—WHEN SECURITY FOR GUARANTY.**—To justify a court in holding that a mortgage or deed of trust given as security for the payment of a debt was also given as security for the performance of a contract of guaranty of such payment, there would have to be to that effect a clear and unequivocal intent expressed in the mortgage or trust deed.
- [4] **ID.—ACTION ON—ATTACHMENT.**—In an action upon a contract of guaranty, a motion to dismiss an attachment upon the ground that the performance thereof is secured by a deed of trust is properly denied where it is found that such deed of trust was given as security for the payment of the principal debt only, and not as security for the performance of the contract of guaranty of payment of that debt.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

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1. Contracts of guaranty generally, note, 105 Am. St. Rep. 502.



Ernest C. Griffith, Loewenthal, Loeb & Walker and Loewenthal, Collins & Loewenthal for Appellants.

Benjamin E. Page and Arthur C. Hurt for Respondent.

HART, J.—The appeal in this action is prosecuted by defendants H. H. Goldschmidt and Goldschmidt Bros. from an order made by the superior court in and for the county of Los Angeles, on August 7, 1917, denying a motion made by said defendants to discharge an attachment theretofore levied upon certain personal property belonging to them.

The complaint was filed on the twentieth day of June, 1917, against the above-named defendants and one Milton Kauffman, but, on the sixteenth day of July, 1917, plaintiff caused the action to be dismissed as against said defendant Kauffman. From that time on the action was against the guarantors alone and, consequently, upon the contract of guaranty only, and thus the action stood when the notice of the motion to discharge the attachment was given on August 1, 1917.

The complaint was in two counts, in the first of which it was alleged that, on or about the seventeenth day of August, 1915, at the city of Los Angeles, defendant Kauffman, for a valuable consideration, executed and delivered to Hellman Commercial Trust & Savings Bank, a corporation (hereinafter called the bank), his promissory note in writing for the sum of nineteen thousand dollars, payable on demand; that thereafter, for a valuable consideration, said bank assigned and transferred the said note to plaintiff; that the sum of five thousand dollars was paid upon said note, and that at the date of the commencement of the action there was due thereon the sum of fourteen thousand dollars.

In the second count of the complaint it was alleged that, contemporaneously with the making of said promissory note and as a part of the same transaction, the defendants Goldschmidt delivered to said bank their written contract of guaranty, indorsed upon the back of said note, by which they guaranteed "the payment of the within note or any renewal or extension thereof, and all expenses of collection thereof," and also agreed to pay reasonable attorney's fees in case suit was brought to enforce the guaranty. The

assignment of said guaranty to plaintiff was alleged, as well as demand upon defendants, on the seventeenth day of November, 1916, that said note be paid, and one thousand four hundred dollars was asserted to be a reasonable fee to be paid plaintiff's attorneys.

On June 22, 1917, plaintiff filed an affidavit for attachment, in which he stated: "That defendants in the said action are indebted to him in the sum of \$14,585.27 . . . upon an express contract, for the direct payment of money, to wit: upon a promissory note and contract of guaranty and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property. . . ."

Accompanying said affidavit was a "Statement to Clerk," directing that an attachment be levied upon certain real property in the county of Orange, describing it. On the 25th of June, 1917, another "Statement to Clerk" was delivered to the county clerk directing the attachment of the wholesale liquor establishment of Goldschmidt Bros. in Los Angeles; "also run a personal property garnishment directed to the Title Insurance and Trust Company."

The return of the sheriff showed that he levied said writ of attachment on "all moneys, goods, credits, debts due or owing, or any other personal property belonging to the defendants, or either of them, in the possession of or under the control of Title Insurance and Trust Company," and that he also attached the "stock of liquors, store fixtures and all other personal property located" in the city of Los Angeles in the possession of defendants Goldschmidt Bros.

On August 1, 1917, the defendants Goldschmidt served and filed a notice of motion to discharge attachment, supported by the affidavit of Herman H. Goldschmidt, one of the defendants, in which it was stated that, after the signing by Goldschmidt Bros. of said contract of guaranty, Valencia Groves Company, a corporation, to secure the repayment of the indebtedness arising out of said promissory note and said contract of guaranty, conveyed to said bank certain real property described in a declaration of trust, and that said bank accepted said declaration of trust. "Affiant states that said real property is still subject to the lien aforesaid, and the statement made by plaintiff in his affi-

davit for attachment that payment of the alleged contract on which suit was brought has not been secured, is erroneous."

Attached to said affidavit was a copy of said declaration of trust, in which said bank certified and declared that it had received and accepted from the Valencia Groves Company, the trustor, deeds conveying to said trustee certain real property in the county of Los Angeles (describing two parcels of land, the first of which was subject to a mortgage of ninety thousand dollars and the second to a mortgage of eighty-five thousand dollars), in trust for the following purposes: First, to secure the payment to the bank "of the debts evidenced by two notes, for nineteen thousand dollars and two thousand dollars, respectively," said note for nineteen thousand dollars being the one herein sued upon. The contract of guaranty signed by Goldschmidt Bros. on the back of said note is also reproduced. The note for two thousand dollars bore date of January 28, 1916, and was signed by Milton Kauffman and Isaac Kauffman, and contained a guaranty signed by Max Goldschmidt. Second, after the payment in full of the debts evidenced by said notes, to secure the payment of a certain note of the Valencia Groves Company to David S. Unruh for the sum of \$2,155.12.

The single question presented hinges on the real meaning and scope of the trust deed. The appellants contend that the declaration of trust was intended to secure payment not only of the promissory notes referred to in said declaration (one executed by Milton Kauffman and the other by Milton and Isaac Kauffman), but also the performance of the conditions of each of the guaranties indorsed on said notes, the one by Goldschmidt Bros. by Max Goldschmidt and the other by Max Goldschmidt. The position of the appellants is that the provision in the declaration of trust, to wit: "To secure the payment to Hellman Commercial Trust and Savings Bank . . . of the *debts* [*italics ours*] evidenced by two notes," etc., can reasonably be given no other construction than that it means, and was intended to mean, that the security afforded by the said declaration was to include and cover not only the promissory notes but the performance of the contracts of guaranty. With this view of the provision referred to we are unable to agree.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person (Civ. Code, sec. 2787), and a person may become a guarantor even without the knowledge or consent of the principal. (Civ. Code, sec. 2788.)

[1] A guaranty is, therefore, an independent contract—that is, entirely independent of any contract of debt the payment of which is thus assured, and it follows that an action on a guaranty such as the one involved herein is upon an independent contract of the guarantor with which the principal debtor has nothing to do. “The liability of the guarantor depends entirely upon the terms of his contract of guaranty, and ‘there is no privity, or mutuality, or joint liability between the principal debtor and his guarantor.’ ” (*Cooke v. Mesmer*, 164 Cal. 332, 340, [128 Pac. 917, 920]. See, also, *Adams v. Wallace*, 119 Cal. 67, [51 Pac. 14]; *Kinsel v. Ballou*, 151 Cal. 762, [91 Pac. 620].)

[2] A mortgage or a trust deed given to secure the performance of an obligation to pay money and a guaranty given for the same purpose are each intended, of course, to subserve the same purpose, and where both are given to secure one single obligation of that character, the one operates merely as additional security to the other. But the creditor may resort either to the one or the other to enforce the payment of the money to secure the payment of which both were given. In case of a contract of surety executed to secure the performance of the obligation which is also secured by a mortgage or other collateral security the law is different. In the latter case, the holder of the mortgage or other security would be compelled to apply to the payment of the debt the property of the debtor which had been mortgaged to secure the debt. (Civ. Code, sec. 2850; *Adams v. Wallace*, *supra*.) Such, however, is not the case as to a guarantor, as we have shown.

[3] In view of the character and effect of a contract of guaranty, as above indicated—that is, that it creates an obligation wholly independent of that of the debt which it is given to secure—there would have to be to that effect a clear and unequivocal intent expressed in a mortgage or a trust deed given to secure the payment of a large sum of money, where there has also been given a guaranty for the payment of the same debt, to justify a court in holding that the purpose of the mortgage or trust deed, given subse-

quently to the execution of the contract of guaranty, was to secure payment not only of the promissory note evidencing such debt but also to secure the performance of the contract of guaranty. This is true because the guaranty is itself security for the payment of the same debt. It is hardly supposable that in such case property would be hypothecated to secure a security already in existence to secure the debt to secure the payment of which such property is hypothecated. No such intent is clearly and unequivocally expressed in the instrument involved herein. The word "debts," we think it is clear from a fair and reasonable construction of the declaration of trust, means, and was intended to mean, the debts created by the notes themselves and was not intended to refer to and include the obligations created by the guarantors by their contracts of guaranty. It is true the declaration of trust sets out therein not only the notes but also the contracts of guaranty, but the latter contracts were indorsed on the back of the notes, and it was not only proper but necessary, as a matter of description—that is, for the purpose of describing the notes to secure the payment of which the trust deed was given—to insert in the declaration of trust the contracts of guaranty.

[4] Our conclusion is that the motion to dissolve the attachment was properly denied, and the order denying said motion is, accordingly, affirmed.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 7, 1920.

All the Justices concurred.

[Civ. No. 3297. First Appellate District, Division One.—April 8, 1920.]

**THE PIONEER FRUIT COMPANY** (a Corporation), Respondent, v. **SOUTHERN PACIFIC COMPANY** (a Corporation), Appellant.

- [1] **CARRIERS — NATURE OF BILL OF LADING — ACTION FOR BREACH — STATUTE OF LIMITATIONS.**—A bill of lading is not only a receipt for the goods consigned to the carrier for shipment but also a contract between the carrier and the shipper as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified, and an action against the carrier for a breach thereof, if commenced within four years, is not barred by the statute of limitations.
- [2] **ID.—TIME FOR PRESENTATION OF CLAIM—COMPLIANCE WITH BILL OF LADING.**—A provision in a bill of lading requiring claims for damages for loss or injury to goods shipped to be made in writing to the carrier at the point of delivery or of origin within four months after the delivery of the property is complied with by the giving of written notice of the claim by the agent of the consignee to the general freight agent of the delivering carrier at the time of the arrival of the shipment at its destination.
- [3] **ID.—ACTION FOR BREACH—APPEAL—INSUFFICIENT RECORD.**—Where the record on appeal from the judgment in favor of the plaintiff in an action against the carrier for breach of its contract for the transportation and delivery of goods does not contain a copy of the bill of lading involved, the appellate court cannot know there was any provision therein as to the time within which the plaintiff's claim for damages for the breach of its terms must have been presented.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Affirmed.

The facts are stated in the opinion of the court.

Henry T. Gage and W. I. Gilbert for Appellant.

Frederick R. Levee and James E. Kelby for Respondent.

**RICHARDS, J.**—This action was instituted by the plaintiff to recover from the defendant the sum of \$2,576.25, damages alleged to have been sustained by the plaintiff in

connection with the shipment of a carload of cherries from San Jose, California, to Boston, Massachusetts, during the month of June, 1913, and which were consigned by the plaintiff to a corporation known as California Fruit Distributors through the defendant as shipper, upon a bill of lading issued in compliance with the Interstate Commerce Act. The plaintiff's claim was based upon two alleged breaches of the contract of shipment in that, first, the defendant allowed the car in which these cherries were transported to be insufficiently iced; second, that the defendant permitted an unreasonable delay to occur in the shipment of the cherries, as a result of both of which alleged breaches of the terms of shipment the cherries arrived in Boston in a damaged condition to the plaintiff's detriment in the sum for which suit was brought. The defendant denied specifically the averments of the complaint as to any breach of its duty as a carrier in the premises, and also pleaded that the plaintiff's cause of action was barred under the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, and was also barred under the provisions of section 3 of the bill of lading requiring claims for damages for loss or injury to goods shipped to be made in writing to the carrier at the point of delivery or of origin within four months after the delivery of the property, which claim the defendant avers was not so presented.

Upon the trial of the issues thus framed the trial court made its findings in favor of the plaintiff except as to the amount of its said damages, which it fixed at \$574. The defendant prosecutes this appeal.

[1] The main point urged by the appellant relates to the bar of the statute of limitations under the section of the code above quoted. It is argued by it that this is not an action upon a contract, obligation, or liability founded upon an instrument in writing, and hence that the action must have been commenced within two years after the liability arose, and that not having been so commenced it is barred under said section of the code. In order to support this proposition the appellant argues that the bill of lading issued by the defendant to the plaintiff upon the receipt of these goods for shipment was not the contract between the parties, but was only a receipt for the goods orally consigned to the defendant for shipment; and that such consignment

being oral the action must, under said section of the code, have been commenced within two years.

We are unable to adopt this view of the appellant as to the place and function of a bill of lading in a shipping consignment. Section 2126 of the Civil Code defines a bill of lading as "an instrument in writing signed by the carrier or its agent describing the freight so as to identify it, stating the name of the consignor, terms of the contract for carriage, and agreeing to deliver the freight to a specified person at a specified place." In the *American & English Encyclopedia of Law*, second edition, page 521, the status and function of a bill of lading in relation to a shipment of goods are thus defined: "Although the primary object and purpose of a bill of lading is to express the terms of a contract between the shipper and the carrier, it partakes of the twofold character of a receipt and a contract; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified."

In the case of *Seaboard Airline Ry. v. Luke*, 19 Ga. App. 100, [90 S. E. 1041], it was held in relation to an interstate shipment that the bill of lading was the contract between the parties to the shipment, citing *Georgia etc. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, [60 L. Ed. 948, 36 Sup. Ct. Rep. 541]; while in the cases of *Texas etc. R. Co. v. Williamson & Co.* (Tex. Civ. App.), 187 S. W. 354, and *New York Cent. R. R. Co. v. Mutual Orange Distributors*, 251 Fed. 230, [163 C. C. A. 386], it was held that the bill of lading constituted the contract for carriage between the parties, for actions for the breach of the terms of which the period of limitations was that provided for the breach of contracts in writing. We find nothing in the authorities cited by the appellant which militates seriously against these views, and hence are entirely satisfied that this action was commenced in time.

[2] As to the second point urged by the appellant, to the effect that the plaintiff did not present a proper claim for damages against the defendant within the time required by the terms of the bill of lading, we find that the record does not bear out this contention, since it sufficiently appears that written notice of the claim was given by the agent of



the consignee to the general freight agent of the delivering carrier at the time of the arrival of the shipment at its destination. [3] Besides, the parties to this appeal have not furnished us with any copy of the bill of lading involved in this case, and hence we cannot know that there is any such provision in it as to the time within which the shipper's claim for damages for the breach of its terms must be presented.

No other points being urged upon this appeal, the judgment is affirmed.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

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[Civ. No. 3257. First Appellate District, Division Two.—April 9, 1920.]

T. G. PALVUTZIAN, Appellant, v. JOHN K. TERKANIAN et al., Respondents.

- [1] **EASEMENTS — IRRIGATION CANALS — DIVISION OF TRACT — IMPLIED UNDERSTANDING.**—Where the owner of a tract of land sells a portion thereof across which are constructed certain ditches or canals which are the visible and obvious means of transporting water to the remainder of the tract, in the absence of an express understanding, an implied understanding arises that the burdens and correlative advantages due to the presence of such ditches or canals shall continue as they existed before the separation of the title.
- [2] **ESTOPPEL—PLEADING.**—If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel shall be pleaded in technical terms.

**APPEAL** from a judgment of the Superior Court of Fresno County. D. A. Cashin, Judge. Reversed.

The facts are stated in the opinion of the court.

Astor Elmassian, G. L. Aynesworth and H. M. Johnston for Appellant.

C. K. Bonestell and John A. Steele for Respondents.

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1. Implied grant of easements upon severance and sale of property, notes, 34 Am. St. Rep. 708; 3 L. E. A. (N. S.) 1082.

BRITAIN, J.—From a judgment in favor of the defendants the plaintiff appeals. The suit was for damages and for injunction to prevent interference with certain irrigating ditches and the flow of water over the defendants' land for which the plaintiff claimed an easement.

The court found that prior to 1885 the predecessors of both the plaintiff and defendants owned in one body the lands now owned by them severally. While the lands were held in single ownership two irrigation ditches or canals were constructed across the tract. These ditches were connected with the main ditch or canal of the Fresno Canal and Land Corporation's system of irrigating ditches. Since their construction they have been the only source from which water can be obtained for the irrigation of plaintiff's land, except by the installation of a pumping plant or the acquisition of a right of way for ditches over other property. The ditches were at all times since 1885 the visible and obvious means of transporting water to the lands now owned by the plaintiff. For two or three years between 1885 and 1908 they were not used, but they were used continuously for five years commencing in 1909. In 1908 the owner of the entire tract conveyed to the defendant Terkanian one portion of the tract. Thereafter the grantor and his successors used the ditches on the portion theretofore conveyed. The plaintiff acquired his portion of the original tract in 1915. In October, 1916, "at the special instance and request of the defendant, John K. Terkanian, and one Kienitz," who was the owner of an adjoining tract over which the ditches in controversy ran, Kienitz, the plaintiff, and Terkanian entered into an agreement which is summarized in the findings, but to which it is proper to make some further reference. Kienitz was named as the party of the first part and the plaintiff, Palvutzian, and the defendant, Terkanian, were joined under the designation of the "second party." It recited the ownership of Kienitz of his land, "and that a certain ditch or canal is now located upon the premises of the first party and that said ditch or canal is now used for the purpose of furnishing water for irrigation purposes to second party." It was agreed that "in consideration that first party furnish to second party through and by means of a pipe-line [which was to be and was constructed in lieu of the old ditch on the Kienitz land]

an amount of water equal to the quantity which has been furnished by said ditch or canal to second party; second party hereby agrees to waive any and all rights that they may or might have in said ditch and further agree that said first party shall be allowed to obliterate said ditch and substitute therefor the said proposed pipe-line, it being understood that first party shall in no manner lessen the quantity of water heretofore furnished to second party by and through said ditch or canal." Taking this contract by its four corners it appears to have been made as much for the benefit of the plaintiff as for the defendant, Terkanian; that the latter by joining in it recognized Palvutzian's right to the water as equal to his own, and that all three of the adjoining land owners recognized the right of the lower owners on the ditch to the flow of water over the lands of the upper owners, merely agreeing that on one of the upper tracts the pipe-line might be substituted for the existing ditch, thus changing the easement from the right to have the ditch maintained to one to have the same flow of water through the pipes.

Pursuant to this contract the court further found that Kienitz constructed the pipe-line and plowed up the ditches on his land; that Terkanian made a ditch connecting the Kienitz pipe-line with the westerly of the two ditches over the defendants' land leading to that of the plaintiff, but refused in April, 1918, to allow the plaintiff to connect the pipe-line with that ditch. In May, 1918, Terkanian plowed up and filled the easterly ditch and the westerly ditch so that the plaintiff could not thereafter obtain water for irrigation thereby. Sixty acres of the plaintiff's land was then planted in Thompson seedless grape-vines and sixty acres were in pasture; neither the grape-vines nor the pasture will grow or produce without irrigation during the irrigating seasons. It was then found that by reason of the acts of the defendants in plowing and filling up the ditches the plaintiff has been prevented from irrigating any portion of his premises from the old source of supply; that his grape-vines and pasture have been dying out and will die out entirely unless they are irrigated; that there was water in the main canals of the irrigation system which would have flowed to and upon plaintiff's premises for irrigation if the ditches had not been plowed and filled up; that the plaintiff's land

has depreciated in value in the sum of three hundred dollars; that the defendants threaten and intend to and will keep the ditches plowed and filled up so that the plaintiff cannot obtain water through them for the purpose of irrigating his land; the plaintiff's damages unless water be obtained for irrigation will be irreparable, the premises materially reduced in value, and the pasture and seedless grape-vines on the plaintiff's land will be rendered valueless; and that the plaintiff has no plain, speedy, or adequate remedy at law. The court further found that neither the plaintiff nor Terkanian had acquired as against the other any adverse interest in the ditches since the date of the deed to Terkanian.

[1] Upon these findings the court concluded that by the conveyance to Terkanian the plaintiff's predecessor conveyed to him all his right, title, and interest in and to the ditches and there was no express or implied right of way reserved over the land for ditches to irrigate the land he afterward conveyed to the plaintiff; that in the use of the irrigation ditches after the deed to Terkanian, plaintiff's grantor or successors in interest was without right and that Terkanian had the right to plow and fill up the ditches and is not liable for damages which the plaintiff suffered thereby. The plaintiff and appellant maintains that upon the findings of fact these conclusions of law cannot be sustained, and that in the determination of this appeal, on the findings, judgment should be entered for the plaintiff for the damages found to have been sustained by him and for injunction in accordance with the prayer of his complaint.

The respondent contends that under the facts the case is not to be differentiated from *Taylor v. Avila*, 175 Cal. 203, [165 Pac. 533]. The appellant relies upon a number of cases which unquestionably sustain his position, unless the decision in *Taylor v. Avila*, *supra*, is determinative. (*Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, [17 Pac. 69]; *Dixon v. Schermeier*, 110 Cal. 582, [42 Pac. 1091]; *Jones v. Sanders*, 138 Cal. 405-412, [71 Pac. 506]; *Jersey Farm Co. v. Atlanta R. Co.*, 164 Cal. 412, [129 Pac. 593]; *Cheda v. Bodkin*, 173 Cal. 7, [158 Pac. 1025].) Except *Cave v. Crafts*, cited upon another proposition than the one chiefly involved in this case, none of these cases was referred to in the opinion of *Taylor v. Avila*. An examination of

the record and briefs in *Taylor v. Avila* shows that the rule of law announced in the cases relied on by the appellant was not presented to nor considered by the court. It had before it solely the question of the construction and effect of a particular deed. Upon this question the only matters argued in the briefs or decided by the court were that the language used in the deed purported to transfer to the grantee all water rights, ditch rights, etc., and that it did not purport to reserve any then existing water rights for the benefit of the tract of land from which that conveyed by the deed was severed. It is elementary that every decision is limited in its application to the matters then before the court. (*Grant v. Murphy*, 116 Cal. 432, [58 Am. St. Rep. 188, 48 Pac. 481]; *Chapman v. State*, 104 Cal. 690-697, [43 Am. St. Rep. 158, 38 Pac. 457].) The decision under consideration was a Department decision, and it does not appear that rehearing by the court in Bank was sought. It is significant that in the opinion it was suggested there was a probability that the parties intended to include in the deed a reservation in favor of the grantor of the existing easement she then possessed and that by mutual mistake it was omitted therefrom. It was stated the complaint contained no allegation of such mistake and the plaintiff did not seek reformation of the deed. The opinion closes with the statement that "as the record stands, we have no choice but to reverse the judgment and order, and it is so ordered." It is also elementary that on appeal matters not argued by the appellant are deemed to have been waived. (*Churchill v. Lauer*, 84 Cal. 233, 234, [24 Pac. 107]; *Rogers v. Schlotterback*, 167 Cal. 35, 52, 53, [138 Pac. 728].)

If the appellant in *Taylor v. Avila* had presented to the court argument under the rule announced in *Cheda v. Bodkin*, *supra*, and *Jersey Farm Co. v. Atlanta R. Co.* *supra*, and the decision in *Taylor v. Avila* had been rendered in its present form, this court might have been warranted in concluding the effect of *Taylor v. Avila* was to overrule the earlier cases. That they are not overruled appears from the fact that in a later case, the rule declared in *Cheda v. Bodkin*, *supra*, was reannounced by the supreme court and that case cited as authority, the statement being "the mere fact that appellant's predecessor was the grantee of one of the respondents under a warranty deed does not prevent

an assertion by plaintiff of a right to use the track. Where the owner of one tract of land sells part of it, and that part is burdened by an obvious easement in favor of other persons, or other parts of the larger tract, an implied understanding arises that the burdens and correlative advantages shall continue as they existed before the separation of the title." (*Southern Pac. Co. v. Los Angeles Mill Co.*, 177 Cal. 402, [170 Pac. 832].) This latter decision was one of the other department of the supreme court. It is not only the later opinion of the court, but it appears that there was an application for hearing which was denied. This court is bound by the later decision, supported as it is by a long line of decisions not considered in *Taylor v. Avila*.

The rule of law which was reannounced in *Southern Pac. Co. v. Los Angeles Mill Co.*, *supra*, received lengthy and careful consideration by this court in *Kallenburg v. Long*, 39 Cal. App. 731, [179 Pac. 730], and in *Nay v. Bernard*, 40 Cal. App. 364, [180 Pac. 827], and in both cases it was applied in the manner in which the appellant maintains it should be applied in this case. The matter has received further careful consideration, and no reason appears why this court should overturn a rule of property which has been recognized in this state since the decision in *Cave v. Crafts*, 53 Cal. 135, decided by the supreme court in 1878. Upon the facts found by the trial court, it appears that when the Terkanian deed was made the land conveyed was burdened with an obvious easement for the maintenance of the ditches and flow of water to the property retained by Terkanian's grantor and subsequently conveyed to the plaintiff, and that under the rule to which reference has been made, the defendants had no right to destroy the ditches and thus to irreparably injure the plaintiff and his lands.

This case may be further differentiated from *Taylor v. Avila*, in that it appears in that case there was no allegation to support a reformation of the deed to express the true intent of the parties. In this case the plaintiff sets up the agreement by which Kienitz and Terkanian both recognized the right of the lower owners to the maintenance of the ditches and the flow of water, and the court found that the plaintiff entered into that agreement at the special instance and request, not alone of Kienitz, but of Terkanian. The contract on its face showed that it was made for the benefit

both of the plaintiff and Terkanian. [2] If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel shall be pleaded in technical words. (*Carpy v. Dowdell*, 115 Cal. 677, [47 Pac. 695]; *Beardsley v. Clem*, 137 Cal. 328, 332, [70 Pac. 175].) The effect of pleading this contract, connected with the finding in regard to it, creates an estoppel as against the defendants to assert that an easement, the existence of which was so recognized, does not exist.

The judgment is reversed, with instructions to the trial court to take such further proceedings as are consistent with the views herein expressed.

Langdon, P. J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 7, 1920, and the following opinion then rendered thereon:

SHAW, J.—Upon the denial of the petition for a rehearing in this case I deem it advisable to state one feature of the decision in *Taylor v. Avila*, 175 Cal. 203, [165 Pac. 533], which is not noticed in the opinion of the district court of appeal and which clearly distinguishes it from the present case. The facts in that case were, that originally Taylor owned eighty acres, being a west half of a northwest quarter, and Avila or his predecessors owned forty acres adjoining the north end of the eighty acres. Through these tracts a ditch was made leading from the canal to the north and it was in use for the purpose of irrigating both tracts. Afterward Taylor conveyed the north twenty-five acres of her eighty acre tract to one Gularte. Thereafter she continued to use the ditch as before, although no reservation of the right to do so had been made in her deed to Gularte for the twenty-five acres. Afterward Gularte sold the twenty-five acres to Avila and she joined with Gularte in the deed conveying said twenty-five acres to Avila.

The significant fact in the case is that she had no right or interest whatever in the twenty-five acres at the time she joined in the deed of Gularte to Avila, except her implied easement, consisting of her right to maintain the ditch

through said twenty-five acres for the benefit of her remaining fifty-five acres of the eighty acre tract, and that her deed to Avila expressly purported to convey all ditch rights or interests in ditches for irrigating. The only effect the deed could have, so far as she was concerned, was to convey her right to the ditch. There was, therefore, no room for the operation of any implication that she reserved the ditch right, since, from the circumstances, it was obvious that the only possible intention on her part in joining in the deed was to convey to the defendant her right in the said ditch over the twenty-five acre tract. The case of *Taylor v. Avila* is, in all respects, parallel to that of *Dixon v. Schermeier*, 110 Cal. 582, [42 Pac. 1091], in which the same conclusion was reached, and it is not contrary to the decisions in *Cave v. Crafts*, 53 Cal. 139; *Quinlan v. Noble*, 75 Cal. 250, [17 Pac. 69]; *Jones v. Sanders*, 138 Cal. 405, [71 Pac. 506]; *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 412, [129 Pac. 593]; *Cheda v. Bodkin*, 173 Cal. 7, [158 Pac. 1025].

All the Justices concurred.

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[Civ. No. 3310. First Appellate District, Division One.—April 9, 1920.]

ALBERT L. BRUSH, Respondent, v. SOUTHERN PACIFIC COMPANY (a Corporation), et al., Appellants.

[1] NEGLIGENCE — CONSTRUCTION OF BRIDGE — OBSTRUCTION OF STORM WATERS — ACTION FOR DAMAGES — EVIDENCE — STATEMENT OF DEFENDANTS' EMPLOYEE.—In an action for damages for injury to land caused by the obstruction of storm waters by a bridge alleged to have been negligently constructed and maintained by the defendants, the testimony of a witness that an employee of the defendants, who was not in any way connected with the defendants at the time the bridge was constructed years before but who examined the bridge some time after the overflow, stated that the bridge was not properly constructed because of the piling being driven diagonally across the stream, is inadmissible as a

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1. Admissibility as *res gestae* of statements made by agent or servant some time after accident, note, 42 L. B. A. (N. S.) 918.



declaration by the employee against his employer, the conversation in question not being part of the *res gestae*.

- [2] **ID.—CONSEQUENTIAL INJURY — NATURE OF ACTION — STATUTE OF LIMITATIONS.**—An action for damages for injury to land caused by the obstruction of storm waters, as the result of the construction of a bridge, is not for a trespass upon real property, but is in the nature of an action upon the case at common law for a consequential injury, which is not barred by the statute of limitations if commenced within two years after the receipt of such injury.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Henry T. Gage and W. I. Gilbert for Appellants.

Bradner W. Lee, Kenyon F. Lee and Bradner W. Lee, Jr., for Respondent.

**WASTE, P. J.**—Plaintiff brought this action, alleging that the defendants so negligently constructed, and maintained, a bridge over a waterway, or "wash," extending from the San Dimas Canyon, in the Sierra Madre Mountains, that during an unusually heavy rainfall, in the months of January and February, 1914, large quantities of trees, rocks, orchard cuttings, railroad ties, planks, and other debris were carried by the water, and accumulated against and between the piling of said bridge, clogging up the waterway, causing the water to dam up for a distance of eight hundred feet back of the bridge, destroying seventy-five orange trees, and injuring five hundred others; also causing gravel to be deposited over about six acres of plaintiff's land, to a depth of one to three feet. Judgment was entered for the plaintiff for the sum of seven thousand two hundred dollars, after a verdict for that amount by a jury, and the defendants appeal.

In defense of the action the defendants set up that the lands described in plaintiff's complaint were, as a matter of fact, part of the natural course and bed of the San Dimas wash, which the plaintiff set about to reclaim; that, by reason of the construction of a retaining wall by the plaintiff, along the natural line of the bank of the wash, in said

work of reclamation, the water was prevented from following its natural course; and, further, that the bridge was of substantial construction, erected in 1884, permanent in its nature, and that any cause of action against the defendants by reason of the faulty erection of the bridge, was barred by the statute of limitations. Defendants also alleged an unprecedented amount of rainfall as the cause of the excessive flow in the waterway.

The judgment must be reversed. [1] After the overflow W. H. Whalen, division superintendent of the Los Angeles division of the defendant Southern Pacific Company, made an examination of the bridge. Over the objection of the defendants, witness Carlson was permitted to testify that upon the occasion of this inspection Whalen stated that the bridge was not properly constructed because of the piling being driven diagonally across the stream. The purpose of the introduction of this testimony was to show that the bridge was an obstruction to the stream. The admission of this testimony was error. The conversation not being part of the *res gestae* was inadmissible as a declaration by the employee against his employer. (*Silveira v. Iversen*, 128 Cal. 187, 191, [60 Pac. 687].) The bridge was constructed many years before the division superintendent became in any way connected with defendant, and the declaration, if made by him concerning it, was inadmissible as not made in regard to a transaction in the course of his agency depending at the very time of the declaration. (*Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388, [28 Pac. 485]; *Umstead v. Automobile Funding Co. of America*, 44 Cal. App. 16, [185 Pac. 1011].)

Respondent seeks to justify the admission of this testimony upon the theory that it was alleged in the complaint, and denied in the answer, that the defendants knew, or could have known by the exercise of ordinary diligence, that it was necessary for them to keep said bridge open, and free and clear of all debris, in order that the natural flow and free passage of rain and storm water, and such debris, would not be prevented. It is also urged that Whalen's declaration should not have prejudiced defendants, because they themselves developed that the wooden pile bridge had been removed and a steel span bridge suspended after the damage. Whalen was himself called to the stand and denied Carlson's

testimony. Respondent argues, therefore, that it was for the jury to decide which of the two men to believe. None of these contentions remove the testimony from the application of the rule adhered to in the foregoing authorities.

[2] Appellants contend that the cause of action of the plaintiff is barred by the statute of limitations, not having been begun within either two or three years following the erection of the bridge which was proved to be a permanent structure. They take the position that the limitation period for injury to land, under such circumstances, begins to run from the completion of the structure, although the injury may occur during periods of high water, during successive years thereafter. Appellants have misconstrued the nature of the present action. It is not one to recover for an injury, direct and resulting immediately, from the construction of the bridge, but relates to damages which were an after-result from the erection of that structure. In other words, the action for damages for the injury to the plaintiff's land, caused by the obstruction of the storm waters in San Dimas Canyon, as the result of the construction of the bridge by the defendants, is not for a trespass upon real property, but it is in the nature of an action upon the case at common law for a consequential injury. (*Daneri v. Southern California Ry. Co.*, 122 Cal. 507, [55 Pac. 243]; *Hicks v. Drew*, 117 Cal. 305, 309, [49 Pac. 189].)

The true rule as to the application of the statute of limitations in such cases is stated by Mr. Redfield in his work on Railways (sixth edition, volume 1, page 595) as follows: "The general rule in regard to the time of the accruing of the action is, that when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act; but where the act is injurious only from its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury."

The case at bar falls within the decision of *St. Louis etc. Ry. v. Biggs*, 52 Ark. 240, 244, [20 Am. St. Rep. 174, 6 L. R. A. 804, 12 S. W. 331], where the supreme court of Arkansas said: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once

fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. (*St. Louis etc. Ry. Co. v. Morris*, 35 Ark. 622; *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463.) But when such structure is permanent in its character, and its construction and continuance are *not necessarily* injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of. (Citing cases.)"

The building of the bridge by the defendants was not of itself a nuisance or an invasion of plaintiff's rights, but became so only when, by reason of its alleged faulty construction, it diverted the storm waters and debris from the usual channel upon plaintiff's land. (*International etc. R. Co. v. Kyle* (Tex. Civ. App.), 101 S. W. 272; *St. Louis etc. Ry. Co. v. Hoshall*, 82 Ark. 387, [102 S. W. 207]; *Texas & P. Ry. Co. v. Ford*, 54 Tex. Civ. App. 312, [117 S. W. 203]; *Hill v. Empire etc. Co.* (Idaho), 158 Fed. 881.) Suit in the instant case having been commenced within two years after the receipt of these consequential injuries by plaintiff, his causes of action were not barred by the statute of limitations. (*Daneri v. Southern California Ry. Co.*, 122 Cal. 507, [55 Pac. 243]; *Hicks v. Drew*, 117 Cal. 305, 309, [49 Pac. 189].)

The authorities relied upon by appellants to the contrary deal with cases where injuries caused by permanent structures infringed immediately upon plaintiff's rights. Such instances are, where water is permanently polluted, streams immediately caused to flow back on adjacent land, and currents of a river turned aside by permanent dikes, at once begin to cut into the opposite bank. They do not deal with cases similar to the one at bar, where a permanent and lawful structure has for many years existed without any consequential injury resulting from its construction.

The appellants complain of the giving of certain instructions and of the refusal of the trial court to give others. Taking the charge as a whole, we think the jury was properly instructed.

The judgment is reversed.

Richards, J., and Knight, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 7, 1920.

All the Justices concurred.

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[Civ. No. 3256. First Appellate District, Division Two.—April 10, 1920.]

G. L. TYLER, Respondent, v. J. I. MITROVICH BUILDING COMPANY, INC., et al., Defendants; ADOLPH D. GRABSTEIN et al., Appellants.

SUNSET LUMBER COMPANY, Respondent, v. J. I. MITROVICH BUILDING COMPANY, INC., et al., Defendants; ADOLPH D. GRABSTEIN et al., Appellants; W. J. BUCHANAN et al., Respondents.

HENRY COWELL LIME AND CEMENT COMPANY, Respondent, v. J. I. MITROVICH BUILDING COMPANY, INC., et al., Defendants; ADOLPH D. GRABSTEIN et al., Appellants.

- [1] **MECHANICS' LIENS — PLEADING — CONSOLIDATION OF ACTIONS FOR TRIAL.**—Where several actions for the foreclosure of mechanics' liens and for deficiency judgments against the contractor and the sureties upon his bond are consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading, the allegations in one complaint remedying the defects or omissions in another.
- [2] **ID.—EXECUTION AND FILING OF BOND — FRAUD — PRESUMPTION — PLEADING.**—Where it is alleged in one of the complaints in such actions that a bond was duly made and executed for the purpose of complying with the laws of the state of California, it is to be presumed that the defendants therein did not commit a fraud by filing a "straw" bond. The presumption is always against fraud. It can be put in issue only by direct and positive allegations and must be proved.
- [3] **ID.—RIGHT OF LIEN CLAIMANT TO FORECLOSURE — LIABILITY OF OWNER.**—When no bond has been filed with good and sufficient sureties in compliance with section 1183 of the Code of Civil Procedure, the lien claimant is entitled to a judgment to foreclose his

lien upon the land of the owner, irrespective of the amount due from the owner to the contractor; but where such a bond is filed and it is equitable to do so, the court must restrict recovery from the owner to the aggregate amount due from the owner to the contractor.

- [4] **ID.—RIGHT TO FORECLOSURE UPON PROPERTY OF OWNER—PLEADING.** In order to entitle the lien claimant to a foreclosure upon the property of the owner irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of section 1183 of the Code of Civil Procedure with reference to the execution and filing of a bond have not been met.
- [5] **ID.—VALIDITY OF BOND—INCONSISTENT POSITIONS OF LIEN CLAIMANT.**—In an action by a lien claimant to foreclose a mechanic's lien and for a deficiency judgment against the contractor and the sureties upon his bond, the plaintiff cannot denounce the bond as void and claim the right of foreclosure upon the property of the owner, and at the same time demand enforcement of the provisions of the bond that are favorable to him.
- [6] **ID.—FILING OF BOND FOR RECORD—COMPLIANCE WITH CODE SECTION.**—Section 1183 of the Code of Civil Procedure does not require that either the owner or the contractor shall personally file the bond for record. Filing for record by the architect for the owner is sufficient.

**APPEAL** from a judgment of the Superior Court of Contra Costa County. R. H. Latimer, Judge. **Reversed.**

The facts are stated in the opinion of the court.

R. N. Wolfe and J. E. White for Appellants.

Ralph H. Wright, C. L. Colvin, G. G. Hatch and Creed, Jones & Dall for Respondents.

**NOURSE, J.**—This is a joint appeal from a judgment in favor of the plaintiffs in three consolidated cases brought to foreclose their several liens for services and materials furnished to the contractor under a written contract for the construction of a building on the lands of the defendants Grabstein, the owners, and to recover deficiency judgments against the contractor and the sureties upon his bond. Judgment was rendered as prayed in the several complaints and the owners alone appealed.

The allegations of the complaints relating to the execution of the contract, the filing of the liens within due time,

the furnishing of the labor and material, and the amounts due the respective plaintiffs therefor were all admitted. The three actions having been duly consolidated and coming on regularly for trial, a stipulation was made that certain allegations of the complaints were true and that a bond in proper form was filed, but it was left open to the court to determine "whether the bond is sufficient in law." No other evidence was offered by the plaintiffs, and thereupon the defendants Grabstein moved for a nonsuit upon the ground that there was no evidence to sustain a judgment against them to enforce a lien upon their real property. This motion was denied and the defendants declined to offer any evidence, whereupon judgment followed in favor of the plaintiffs as above stated.

There is but one point presented by the record, and that is, upon whom rests the burden of proof that the sureties on the bond filed under section 1183 of the Code of Civil Procedure are good and sufficient. The question of the sufficiency of the sureties upon this bond was not put in issue by any of the three complaints. In the Tyler complaint it was alleged that neither the owners nor the contractor filed a bond. But it was affirmatively alleged that one Cornelius did file a bond, and at the trial it was stipulated that such bond was in due form. The theory of this respondent was that the bond should have been personally filed for record by either the owner or the contractor. In the complaint of the Sunset Lumber Company it was alleged that a bond was duly executed and was thereafter, before the commencement of the work under said contract, filed with the county recorder. A similar allegation appears in the complaint of the Henry Cowell Lime and Cement Company, with the additional allegation that said bond was so made and executed for the purpose of complying with the laws of the state of California. In each of the actions a copy of the bond was made a part of the complaint, the contractor and the sureties upon the bond were made parties defendant, and deficiency judgments were rendered against the contractor and these sureties.

[1] The actions having been consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading, the allegations in one complaint remedying the defects or omissions in another. (Ol-

*son-Mahoney Lumber Co. v. Dunne Investment Co.*, 30 Cal. App. 332, 351, [159 Pac. 178].) [2] Hence, if the bond was made and executed for the purpose of complying with the laws of the state of California, as alleged in the complaint of the Henry Cowell Lime and Cement Company, it is to be presumed that the defendants did not commit a fraud by filing a "straw" bond, as argued by respondents. The presumption is always against fraud. It can be put in issue only by direct and positive allegations and must be proved. [3] When no bond has been filed with good and sufficient sureties in compliance with section 1183, the lien claimant is entitled to a judgment to foreclose his lien upon the land of the owner irrespective of the amount due from the owner to the contractor. But where such a bond is filed and it is equitable to do so, the court must restrict recovery from the owner to the aggregate amount found due from the owner to the contractor. [4] In order to entitle the lien claimant to a foreclosure upon the property irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of this section have not been met.

[5] Furthermore, it is elementary that a party cannot denounce a contract as void and at the same time demand enforcement of its provisions favorable to him. Here all the plaintiffs assumed that the bond was good and joined the sureties as parties defendant, and the court gave judgment against each of the sureties in accordance with the prayers of the complaints. They thus put in issue the bond in its entirety without any allegations in their complaints sufficient to apprise defendants that at the time of the trial they would attack its validity.

[6] On behalf of the respondent Tyler it is argued that the requirements of section 1183 of the Code of Civil Procedure were not met because the bond was actually filed for record by one Cornelius, who appears to have been the architect for the owner. But the section does not require that either the owner or the contractor shall personally file the bond for record.

For the reasons given the judgment is reversed.

Brittain, J., and Langdon, P. J., concurred.



A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 7, 1920.

All the Justices concurred.

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[Civ. No. 3300. First Appellate District, Division One.—April 10, 1920.]

GREER-ROBBINS COMPANY (a Corporation), Respondent, v. THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA (a Corporation), Appellant.

- [1] FIRE INSURANCE—CHANGE OF LOCATION OF GOODS—CONSTRUCTION OF POLICY.—The removal of goods from the rear to the front of a single two-story brick building, without any increase in the risk or hazard, does not constitute a violation of a provision in a policy of fire insurance purporting to cover said goods while situate in the rear of said building.
- [2] ID.—AMBIGUITIES IN POLICY—CONSTRUCTION OF.—Since the language and terms of insurance policies are framed and formulated by the insurer, whenever ambiguities occur therein they are to be resolved in favor of the insured.

APPEAL from a judgment of the Superior Court of Los Angeles County. Wm. D. Dehy, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. W. Hindman for Appellant.

Frank James and James, Smith & McCarthy for Respondent.

RICHARDS, J.—This was an action upon an insurance policy issued by the defendant to plaintiff on September 23, 1916, covering certain auto supplies and sundries of

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2. Rule that doubtful terms must be construed favorably to insured, note, *Ann. Cas.* 1913E, 287.

merchandise belonging to the plaintiff, and being at the time of their destruction by fire in the plaintiff's building at the northeast corner of Flower and Twelfth Streets, in the city of Los Angeles. The policy in question was a California standard form of fire insurance policy, and the terms thereof, in so far as they relate to the description of the location of the property insured, read as follows: "In consideration of the stipulations herein made, and of \$37.50 premium, does insure Greer-Robbins Company, Incorporated . . . to an amount not exceeding \$2,500.00 to the following described property while located and contained as described herein and not elsewhere, to wit: \$2,500.00 on merchandise, materials, sundries, spare and extra parts . . . all while contained in or attached to the brick building, in basements or under sidewalks thereof, and its additions, situate in the rear of No. 1158 South Flower Street, being the northeast corner of West 12th Street."

[1] Upon the date of said insurance policy the goods in question were located in a rear room of the plaintiff's building and place of business on the corner of South Flower and Twelfth Streets, in the city of Los Angeles, but were subsequently moved to a front room of said building, where they were at the time of their destruction by fire. It is the appellant's contention that by the terms of the policy above quoted the obligation of the insurer was to insure said goods only so long as the same were located in the room in the plaintiff's said building in which they were at the time of their insurance, and that their removal to another part of said building terminated the liability of the insurer.

Upon the trial of the cause it appeared that the building and place of business of the plaintiff at the time of the insurance of said property, and also at the time of the destruction thereof by fire, was a single two-story brick building having a frontage of eighty feet on South Flower Street and 155 feet on Twelfth Street; that a fire wall had been constructed in accordance with a building ordinance of the city of Los Angeles across said building near the middle thereof, through which there were two automatic fire doors connecting the front and rear compartments of said building created by the construction of said fire wall. The trial court found from these facts that the rear portion of the building in which said goods were stored at the time of their insurance did not constitute a separate building or addition.

and could not be held to be in any sense a rear or detached building from the plaintiff's main structure, and the court therefore held that the provision of the policy above quoted must be construed as insuring the goods in question while they were contained in any portion of the plaintiff's said building, and hence that the plaintiff, under the terms of said policy, had a right to move and relocate said goods in any portion of its said building without violating the terms of said insurance policy. And the court further found that by the plaintiff's removal of the goods from the rear to the front room of its said building the risk or hazard was decreased. From these findings the trial court drew the conclusion that the plaintiff had not violated the terms of its insurance policy by the change in location of said goods in its said building, and rendered judgment accordingly in plaintiff's favor.

We are entirely satisfied that the court in so doing correctly construed the terms of the insurance policy above set forth. [2] It is true that there is some ambiguity in the language of the policy; but it is well settled that since the language and terms of insurance policies are framed and formulated by the insurer, whenever ambiguities occur therein they are to be resolved in favor of the insured. (*Pacific etc. Co. v. Williamsburgh etc. Fire Ins. Co.*, 158 Cal. 367, [111 Pac. 4]; *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 215, [107 Pac. 292]; *Rankin v. Amazon Ins. Co.*, 89 Cal. 209, [23 Am. St. Rep. 460, 26 Pac. 872].) The ambiguities in the present policy were practically cleared away by the proofs in the case, which showed that the plaintiff's building was a single brick structure and that the goods at the time of their insurance were not in the rear of such structure as the uncertain terms of the policy would seem to indicate, but were actually within the plaintiff's said building at all times, and were simply moved from place to place therein for the convenience of the plaintiff's business. This being so, we are of the opinion that the trial court correctly held that the terms of the plaintiff's policy were not violated by the removal of the goods in question from one part of plaintiff's building to another.

Judgment affirmed.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

[Civ. No. 2099. Third Appellate District.—April 12, 1920.]

**OAKDALE IRRIGATION DISTRICT, Respondent, v.  
T. K. BEARD et al., Appellants.**

- [1] **SURETIES—ACTION ON PERFORMANCE BOND—DAMAGES—EVIDENCE—FINDINGS.**—In this action to recover a money judgment upon a performance bond executed by defendants, as principal and surety, in connection with a contract by the principal to construct certain ditches, pipes, etc., as part of an irrigation system belonging to plaintiff, the evidence was sufficient to support the finding of the trial court that by reason of the failure of the contractor to complete the work in accordance with the terms and specifications of his contract, plaintiff was damaged in the amount for which the bond was given.
- [2] **ID.—DEFECTS IN CONTRACT—VALIDITY OF BOND NOT AFFECTED.**—In an action against the principal and the surety on a bond given as security for the performance by the principal of certain work, it is no defense that there were certain defects in the steps leading up to the making of the original contract and that the law was not in all respects complied with.
- [3] **ID.—NONCOMPLETION OF WORK—RECITALS IN BOND—EVIDENCE.**—Where, after the work was completed by the contractor, payment therefor by the irrigation district was made upon his giving a bond in which it was recited that "whereas of such portions of said contract as has been tested certain parts are unsatisfactory to the board of directors and the engineer of said district, because of the fact that small leaks have developed" and that the irrigation district is willing to pay the contractor if he execute a bond "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract," such recitals are conclusive, or, at least, very strong, evidence that at the time the bond was executed the contractor had not constructed the work in accordance with the terms of the contract.
- [4] **ID.—AGREEMENT TO SUBMIT TO ARBITRATION—JURISDICTION OF COURT.**—An arbitration clause in a contract will not be held to oust the courts of jurisdiction where there are no express words in the contract making submission to arbitration a condition precedent to the bringing of a suit and no language used therein from which such intent can be inferred.

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4. Validity and binding force of arbitration agreements, notes, 29 Am. Rep. 602; 47 L. E. A. (N. S.) 337.

APPEAL from a judgment of the Superior Court of Stanislaus County. W. H. Langdon, Judge. Affirmed.

The facts are stated in the opinion of the court.

L. L. Dennett, Redman & Alexander and Dennett & Zion for Appellants.

P. H. Griffin and Frank G. Boone for Respondent.

ELLISON, P. J., *pro tem.*—The plaintiff brought this action to recover a money judgment upon a bond executed by the defendant T. K. Beard, as principal, and the defendant Aetna Accident & Liability Company, as surety therein.

The record shows that on the twenty-fifth day of February, 1913, the defendant Beard entered into a contract with the plaintiff in and by which he agreed to construct for the plaintiff certain ditches, pipes, etc., as a part of an irrigation system belonging to the plaintiff. The work referred to was the building of the Paulsell canal, Paulsell laterals, the Orange Blossom laterals, the Grey laterals, the Clavey siphon and Booster plant, the River road siphon, and the South lateral siphon, according to plans and specifications prepared by George L. Dillman, engineer for plaintiff. The defendant Beard agreed to do said work in a workmanlike manner and to the satisfaction and approval of said engineer and of the board of directors of plaintiff "in conformity in all respects with the annexed specifications, which are hereby made a part of this contract." The specifications were quite full and complete, and are annexed to the contract. The defendant Beard was to receive for performing the work specified in such contract a sum of money estimated to be about \$85,616. Before entering upon the work he was to give a bond, to be approved by the board of directors of the plaintiff, in an amount estimated in the contract, based upon a percentage of what the work would cost as per the specifications. Having executed the contract and the bond, the defendant Beard proceeded with the construction work agreed to be done by him, and continued therein until on or about the fifteenth day of May, 1914. At that time he appeared before the board of di-

rectors of the plaintiff and expressed his desire to have the large bond which he had been carrying canceled and a new bond given in lieu thereof in the sum of ten thousand dollars and an additional payment made to him of ten thousand dollars, it being claimed by him at the time that there was something more than that amount due to him for the work performed. This proposition was accepted by plaintiff, and a new bond executed with the defendant Aetna Accident & Liability Company, as surety. The ten thousand dollars requested was paid over to him and the old bond released. The new bond, and the one upon which this suit is brought, stated quite fully the mutual understanding of the parties as to the conditions then existing. It recites that there is now due from the plaintiff to the defendant Beard on the contract, dated February 25, 1913, the sum of \$11,280; that such portions of said work as had been tested are unsatisfactory to the board and its engineer, because of small leaks that had developed; that Beard desired a payment of ten thousand dollars to be made to him, the balance of said contract price to be held by plaintiff until Beard should complete said work in a workmanlike manner to the satisfaction and approval of the engineer of said district and the board of directors of plaintiff "in all respects in conformity with the specifications in the original contract." It recited that plaintiff was willing to make said payments of ten thousand dollars upon the defendant Beard giving a new bond in the sum of ten thousand dollars "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract at the earliest possible moment, and that said concrete pipes will all be constructed and repaired within three months after the time of said test." The bond was to be void if the defendant Beard complied with the terms and conditions of a certain resolution of the plaintiff's board of directors, passed May 5, 1914, otherwise to remain in full force and effect. The resolution referred to provides for the payment of the ten thousand dollars upon the execution of the bond conditioned as subsequently on the bond stated. Thereafter, this action was brought upon the bond last referred to, it being alleged in the complaint with much fullness that the defendant Beard had failed to perform his contract and failed to complete said work to the satisfaction of the board or of its engineer,

and failed to complete it in accordance with the terms and specifications of the original contract. The defective construction was alleged to be in that part of the work designated as the Clavey siphon and Booster plant.

The court finds that this work had not been completed in accordance with the contract and the specifications attached thereto, and that by reason of such failure plaintiff had been damaged in the sum of ten thousand dollars and that it would cost the plaintiff at least ten thousand dollars to complete said Clavey siphon and Booster plant according to the specifications annexed to said contract, and entered judgment against both defendants for that amount. This appeal is from the judgment.

[1] 1. The appellant claims that the court accepted the amount of the bond as the measure of damages, and that in doing so it committed a very serious error. An examination of the record convinces us that this contention cannot be sustained. It is true the judgment is for the same amount the bond was given for, but an examination of the record shows that this is merely a coincidence. The court could not render any valid judgment against the surety company for more than the penal sum of the bond. The finding of the court that it would cost the plaintiff at least ten thousand dollars to complete the work according to the specifications has evidence to support it. The witness Finney testified: "Q. Now, what in your opinion would be the value of the Siphon as it now stands? A. Well, it would be—I can't just state right now the exact cost for the reason that the pipe isn't doing its duty and as time goes on it will do less, so that in getting at the cost, about the only way that I could figure the value would be that there would have to be as much money spent on it as the original cost."

The total contract price for this part of the work was about \$23,335.67.

The witness Burton Smith testified: "The condition of the pipe is bad due to the fact that it has many leaks in it, and the fact that there is not a foot of the pipe but what—the length of it but what leaks." He testified that, in his opinion, the present pipe could not be fixed. "Q. You can't make any improvements in that pipe so it could carry the water without it costing as much as if you laid a new pipe,

or the original cost of the pipe? A. I think that it would be fully the original cost of the pipe. In my opinion it would be necessary for the district to put in a new pipe."

There is other evidence as to the defective condition of the pipe, in addition to what has been referred to, to show that the findings of the court as to the defective condition of the pipe and the amount it would cost to put it in good condition have evidence to support them.

[2] 2. Appellant claims that the original contract between the plaintiff and Beard is void. It is not clearly stated in the brief for what reason the original contract was void. This action is not brought upon the original contract, but upon the new bond. By its terms the plaintiff paid to Beard ten thousand dollars upon his written promise to perform certain work, and his bond was that if he did not perform this work the bond should be good. He did not perform it, and, therefore, he and his bondsmen became legally obligated to make payment to the plaintiff. The original contract is referred to as containing a description of the work that the defendant Beard was to perform, and to this extent only it has a bearing upon the decision of the case. Conceding that there may have been certain defects in the steps leading up to the making of the original contract, and that the law was not in all respects complied with, still, such defects are no defense to a suit upon the bond involved herein.

The case of *People's Lumber Co. v. Gillard*, 136 Cal. 55, [68 Pac. 576], is decisive of this matter, wherein it is said: "It appeared that after the bids were all in for the building it was found that they exceeded the money provided—to wit, seven thousand dollars—and the bids were all rejected, and the plans were then gone over and certain changes made to bring the cost down to seven thousand dollars, and Gillard and Leary agreed to build the structure for that sum without further advertising, and thereupon the contract in question was made and the sureties then signed the bond. As to these facts it is sufficient to say that they do not furnish any ground of defense. The bond was executed with reference to the contract annexed to it, and not with reference to any advertised proposals.

"If the board had no authority to make the contract without re-advertising for bids, that fact would not discharge the sureties from their obligations under this bond."



[3] 3. Appellants claim that Beard performed the conditions of the original contract, and that the finding of the court that he did not is not sustained by the evidence.

In the bond upon which this suit is brought (and the bond is signed by both defendants), it is recited that "whereas of such portions of said contract as has been tested certain parts are unsatisfactory to the board of directors and the engineer of said district, because of the fact that small leaks have developed."

It is also in said bond recited that plaintiff is willing to pay Beard ten thousand dollars if he will execute a bond "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract."

If he had fully performed his original contract, as now claimed, he was entitled to be paid therefor the amount agreed upon without giving a new bond conditioned that he would complete it. The recitals of the bond signed by the defendants are conclusive, or, at least, very strong, evidence that at the time it was executed the defendant Beard had not constructed the work in accordance with the terms of the contract.

[4] 4. The original contract contained the provision: "If in the execution of this contract there shall be any ruling of the engineer alleged by either party hereto to be erroneous or unfair, each party shall immediately appoint an arbiter, and the arbiters so appointed shall within four days after their appointment, unless such time is extended by mutual agreement of the parties hereto, render their written agreement in the premises."

Counsel claims that this clause in the contract must be complied with as a condition precedent to the bringing of an action. There are several answers to this contention:

1. This action is not brought on the contract, but the bond, and the bond contained no arbitration clause, and is not so worded as to oust the courts of the right to entertain the case. There are no express words making the submission to arbitration a condition precedent to the bringing of the suit and no language used therein from which such intent can be inferred.

2. In Ruling Case Law, volume 2, page 363, it is said: "But the courts generally will not construe an arbitration

clause as ousting them of their jurisdiction unless such construction is inevitable, and consequently when the arbitration clause is not made a condition precedent by express words or by necessary implication, it will be construed as merely collateral to the liability clause, and so no bar to an action in the courts without an award." See, also, *Hamilton v. Home Ins. Co.*, 137 U. S. 711, [34 L. Ed. 708, 11 Sup. Ct. Rep. 133, see, also, Rose's U. S. Notes], where the same ruling is stated in very clear and strong language.

We have now noticed all the points raised by appellant upon which he claims a reversal of the judgment should be had, and it is our opinion that none of them is sufficient to justify a reversal of the decision of the lower court. The findings are supported by the evidence, and, no reversible error appearing in the record, the judgment is affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred, except Sloane, J., who did not vote.

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[Civ. No. 3249. Second Appellate District, Division One.—April 12, 1920.]

WOODSTONE MARBLE & TILE COMPANY (a Corporation), Appellant, v. DUNSMORE CANYON WATER COMPANY (a Corporation) et al., Defendants; WILLIAM GARLAND, Respondent.

[1] CORPORATIONS—SALE OF STOCK ON EXECUTION—TITLE OF PURCHASER—RULE INAPPLICABLE TO MUTUAL WATER COMPANIES.—The rule that where one at a sale under execution, in the absence of facts shown which charge him with notice that another has an interest therein as owner or pledgee, buys shares of corporate stock standing upon the books of a corporation in the name of

the judgment debtor, he acquires absolute title thereto, is inapplicable in the case of purchase of shares of stock in a mutual water company created not for profit and to pay dividends to the stockholders, but solely for the convenient and more economical management of a common source of water in the distribution of and from which, according to their respective rights, the owners of these several tracts of land are entitled to a supply of water for use thereon.

- [2] **ID.—EXCHANGE OF WATER RIGHT FOR STOCK—SALE OF LAND ON FORECLOSURE—PRIORITY OF TITLE TO WATER RIGHT AS AGAINST EXECUTION PURCHASER OF STOCK.**—Where the owner of a water right as an appurtenance to certain land conveys such water right to a mutual water company created not for profit but solely for the convenient and more economical management of a common source of water and receives in exchange therefor shares of stock in said company in proportion to his previous rights in the water, such water right remains as an appurtenance to the land and passes to the purchaser of the land on the foreclosure of a mortgage duly recorded wherein the owner of the land mortgaged the same, "together with all water rights, pipe-lines, ditches and appurtenances thereunto belonging," as against a subsequent purchaser at execution sale of the stock which still stood on the books of the company in the name of the former owner.
- [3] **ID.—ACTION TO ESTABLISH OWNERSHIP OF STOCK — COMPLIANCE WITH SECTION 324, CIVIL CODE—APPEAL ON JUDGMENT-ROLL—PRESUMPTION.**—On an appeal on the judgment-roll alone, in an action by the execution purchaser of shares of stock in a mutual water company against the purchaser on foreclosure of a mortgage on the land of the execution debtor to obtain a decree adjudging it to be the owner of said stock and for an order requiring the water company to issue to it a certificate for the same, it will be presumed, in support of the judgment and finding of the trial court that such stock was appurtenant to the land and passed with the deed thereto, that the water company complied with the provisions of section 324 of the Civil Code making such stock appurtenant to and transferable with the land.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Affirmed.

The facts are stated in the opinion of the court.

Barstow, Rohe & Jeffers and C. E. Spencer for Appellant.

Hunsaker, Britt & Edwards and G. Harold Janeway for Respondent.

SIIAW, J.—In this action plaintiff sought a decree adjudging it to be the owner of ten shares of stock in the Dunsmore Canyon Water Company and an order requiring said company to issue to it a certificate for the same.

The Dunsmore Canyon Water Company, together with Mrs. John Leenhouts and her husband, who were made parties defendant, suffered default. Defendant Garland filed an answer, and the result of the trial was a judgment against the plaintiff, from which it appeals on the judgment-roll, claiming that it is entitled to have judgment in its favor entered upon the findings.

The facts, as disclosed by the findings, are in substance as follows: In 1886 one Briggs, being the owner of 900 acres of land and the right to use thereon 90/110ths of all the waters of Dunsmore canyon, subdivided the same into ninety ten acre parcels under the name of Crescenta-Canada Tract, which parcels he sold and conveyed, together with the right to 1/110th of the said waters of Dunsmore Canyon as an appurtenance to each of said ten acre parcels of land. In 1908 Mrs. Leenhouts, by mesne conveyance, acquired lot 1, block K, of this subdivision, with which there was conveyed to her as an appurtenance thereto 1/110th of all the waters of Dunsmore Canyon, which supply of water, in the cultivation of said land and the irrigation of the same in growing fruits and other crops, was used thereon from 1886 to the bringing of this action, and without which said land would be of little or no value for the growing of crops thereon. In the year 1908 certain owners of these ten acre tracts of land and the rights to the waters of Dunsmore Canyon so acquired as appurtenant thereto organized a mutual water company, designated the Dunsmore Canyon Water Company, the purpose of which was to facilitate the collection, management, and distribution of the waters of said canyon to the owners of said lands in proportion to their respective rights to said waters; that thereupon Mrs. Leenhouts, as owner of said lot 1, block K, in said tract, and other property owners likewise having interest in the waters of said canyon, conveyed the same to the said corporation, and, as consideration for such conveyance, immediately received shares of the capital stock of said company in proportion to their original rights to the waters of Dunsmore Canyon which had theretofore been conveyed to them

as an appurtenance to their lands, there being issued to Mrs. Leenhouts the ten shares of stock in controversy; that said Water Company is a mutual water company, and, without payment of dividends or profits, distributes the waters to its stockholders in proportion to the number of shares possessed by each; that defendant Garland acquired title to said lot 1, block K, by purchase at a sale duly made upon the foreclosure of a mortgage executed by Mrs. Leenhouts as owner, whereby she mortgaged to him said lot, consisting of ten acres of land, "together with all and singular the . . . water and water rights, pipes, flumes and ditches thereunto belonging"; that at the time of the execution of said mortgage and the sale so made under foreclosure, followed by the execution of the deed to said property, the ten shares of stock in question stood upon the books of said company in the name of Mrs. Leenhouts, and no mention of the stock as such was made in the mortgage and no transfer or delivery thereof was made to the mortgagee. In an action brought against Mrs. Leenhouts by plaintiff, it caused the stock of which she, as shown by the stock books of said company, appeared to be the unconditioned owner, to be attached, and upon judgment being obtained, purchased the shares at sale under an execution issued upon said judgment, all of which acts were had and taken without notice to plaintiff that anyone other than Mrs. Leenhouts had any claim, right or title to the stock. As ultimate facts the court found: "That at the time of the execution and delivery of said mortgage to the said William Garland, all right of Mrs. John Leenhouts to receive water from the said Dunsmore Canyon Water Company was a right appurtenant to the aforesaid lot 1 in block K of the Crescenta-Canada Tract, and formed a part of the property mortgaged at said time to the said defendant William Garland; and that the said William Garland . . . is now, and has been at all times since, the owner and holder of said lot . . . together with all water rights, pipe-lines and appurtenances thereunto belonging, or in anywise appertaining"; and that "said William Garland is the owner and holder of, and entitled to the possession of, the aforesaid ten shares of the capital stock of the Dunsmore Canyon Water Company, standing in the name of the defendant Mrs. John Leenhouts, and all of the right, title, and interest of the said Mrs. John Leenhouts

therein and thereto, and is entitled to have the said stock transferred upon the books of said corporation into his own name." And, further, "that the said William Garland is the only person who has any right, title, or interest in or to said ten shares of stock, and that the plaintiff has no right, title, or interest in or to said ten shares of stock, or any part thereof."

[1] Upon these facts appellant invokes the well-recognized rule that where one at a sale under execution and in the absence of facts shown which charge him with notice that another has an interest therein as owner or pledgee buys shares of corporate stock standing upon the books of a corporation in the name of the judgment debtor, he acquires absolute title thereto. (*Farmers' etc. Bank v. Wilson*, 58 Cal. 600; *Spreckels v. Nevada Bank*, 113 Cal. 272, [54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329]; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, [85 Am. St. Rep. 171, 65 Pac. 622].) Conceding the general application of this rule to purchases of stock so made in a corporation conducted for profit and distributed to its shareholders as dividends, it is, both upon principle and authority, inapplicable to the facts found to exist in the instant case.

That prior to the formation of the Dunsmore Canyon Water Company Mrs. Leenhouts, by virtue of a deed of conveyance, was, as owner of the ten acre tract of land, entitled to 1/110ths of the flow of water in said Dunsmore Canyon as an appurtenance thereto, admits of no controversy, and appellant concedes that neither the deed nor the appurtenance would be the subject of a separate levy and sale, since the right to the water for use upon the land must, upon such facts, be deemed part of the real estate. This being true, how could the ownership be terminated or the appurtenance severed by the mere substitution of the stock for the deed as evidence of ownership? The right to the flow of water was in nowise changed and the use thereof was identically the same after the issuance of the stock as it was prior thereto. The corporation was not created for profit and to pay dividends to the stockholders, but solely and alone for the convenient and more economical management of a common source of water in the distribution of and from which, according to their respective rights, the owners of these several tracts of land were entitled to a supply of water

for use thereon. [2] While it is true that one owning a water right appurtenant to his land may, as held in *Gould v. Stafford*, 91 Cal. 146, [27 Pac. 543], convey it separate from the land and thus sever the connection, nevertheless the mere exchange of one muniment of title to the water right for another cannot be deemed a severance thereof from the land to which it was concededly appurtenant. As said in *Estate of Thomas*, 147 Cal. 236, [81 Pac. 539], where the facts were substantially the same as those here involved: "There was a formal conveyance of the legal title of the several water rights to the corporation, but simultaneously the grantors received certificates of stock which constituted them the beneficiaries of everything so conveyed in the proportion of their original interests. As stockholders they became entitled to receive their proportionate share of all that the company was authorized to divide. It had nothing but water to divide, and of that they received the same share and in the same manner and order in which they had received it before the conveyance. And the successive owners of the six acre tract applied it after the conveyance to that tract as they had done before. All that happened was that a right which they had held and exercised under one title before the conveyance was held and exercised under a (formally) different title afterward. There was in fact no moment of time when they lost the right to use the water, and there was no cessation of its use on the particular tract. Neither the corporation nor any other persons acquired any right to divert it to another use. And the question whether a water right is appurtenant to a particular tract does not depend in the least degree upon the source of title to the water right; it is made appurtenant to the land by use on the land for its benefit, and here the undisputed right of the Fullers and the decedent to receive eight hours' run of all the company's water out of every three hundred and sixty hours was made and continued appurtenant to the six acre tract by use on the land in the irrigation of trees that greatly increased its value, and would perish without it. In view of these facts it is clear that the water right remained appurtenant to the land, that it would have passed by conveyance of the land, and, if so, that it passed by the devise to respondent (Civ. Code, sec. 1311), and did not fall into the residue distributable to the appellant."

The water right in question evidenced by the stock was an appurtenance of the land. The deed followed the foreclosure of a mortgage duly recorded long before plaintiff attached the stock and wherein the owner of the land mortgaged the same, "together with all water rights, pipe-lines, ditches and appurtenances thereunto belonging." Hence, it follows that Garland acquired title to the water right, and his ownership thereof is in nowise affected by any omission as to delivery or transfer of the stock prior to plaintiff's levy and sale thereof made subsequent to the execution and recording of the mortgage.

[3] Moreover, section 324 of the Civil Code provides that a corporation organized for supplying water for irrigation purposes and domestic use may in its by-laws provide that such water shall only be sold and distributed to the owners of its capital stock, and that such stock shall be appurtenant to the lands, when described in the certificate issued therefor, provided such by-law be recorded in the office of the recorder of the county in which the lands are situated, and in such case the shares of stock so located on such land shall only be transferred therewith and pass as an appurtenance thereto. Now, while it appears the Dunsmore Canyon Water Company was a corporation of the description stated in said section, the record is silent as to whether it had complied with the provision in regard to adopting and causing to be recorded a by-law that the stock should be deemed appurtenant to the lands described in the certificate therefor. Nevertheless, conceding the ultimate finding, to the effect that Garland was the exclusive owner of the stock, depended solely upon a showing of compliance on the part of the corporation with the provision referred to, we must, in the absence of evidence to the contrary, or anything appearing in the probative findings which negatives such fact (and there is nothing), assume, if necessary in support of the judgment, that proof of compliance was in fact made and the court based its conclusion thereon. In *United States Film Co. v. United States Fidelity & Guaranty Co.*, 44 Cal. App. 227, 186 Pac. 364, this court said: "Where an appellant complains of errors committed by the trial court, it devolves upon him to produce a duly authenticated record affirmatively showing the alleged error; otherwise the court on appeal must, if under any circumstances the ruling could



be deemed correct, assume that such condition or circumstance was made to appear." To the same effect are: *Escondido High School Dist. v. Escondido Seminary*, 130 Cal. 128, [62 Pac. 401], and *Paine v. San Bernardino Valley Traction Co.*, 143 Cal. 654, [77 Pac. 659]. Hence, for this reason alone, it cannot be said upon the record that the court erred in making the finding of ultimate fact upon which the judgment rests. If such compliance was not shown, then, in order to avail itself of the point, appellant should have brought up a record disclosing the want thereof.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

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[Civ. No. 3197. First Appellate District, Division One.—April 12, 1920.]

CHARLES F. STERN, Substituted, etc., as Superintendent of Banks, Respondent, v. RONALD McDONALD et al., Appellants.

- [1] **PROMISSORY NOTE—SALE OF BONDS BY BANK TO DIRECTORS—VALIDITY OF CONSIDERATION.**—Where, following an impairment of the assets of a bank for which it could be closed, in order to relieve that embarrassment and to insure the bank's continuance in business, the directors, at the direction of the superintendent of banks, purchase certain corporate bonds from the bank, giving their several promissory note, secured by a pledge of the bonds, in payment, such note is based upon a valid consideration.
- [2] **ID.—FRAUDULENT REPRESENTATIONS—RELIANCE ON—PLEADING.**—In an action on such promissory note, the defense of fraud, based upon certain representations claimed to have been made by the superintendent of banks at the time of its execution, is insufficiently pleaded where it is not alleged that the defendants relied upon said representations or that they believed them to be true.
- [3] **ID.—MAKING OF REPRESENTATIONS—DENIAL—FINDINGS—APPEAL.** In such action, the superintendent of banks and the bank examiner who took part in the transaction having denied that such representations were made, and the court having found that their

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1. Consideration for note given to make good depletion of capital or assets of bank, note, L. R. A. 1917B, 688.

testimony was true, that finding is conclusive on the appellate court, notwithstanding there was evidence to the contrary.

- [4] **ID.—ACTION AFFECTING BONDS—DUTY TO PROTECT—ALLEGATION OF OWNERSHIP—RESCISSION OF SALE.**—After the bank became insolvent, an action having been commenced involving the bonds pledged to it as security for the note given in payment thereof, but to which the bank was not made a party, it was the duty of the superintendent of banks to intervene to protect the bonds and to controvert any claim made by third persons claiming ownership or seeking to obtain possession of said bonds, and it was not necessary in such proceeding that the superintendent of banks allege and prove that the bank held said bonds merely as a pledge; and his act in alleging in his cross-complaint in intervention that the bank was the owner of the bonds did not constitute a rescission or repudiation of their sale to the directors of the bank.
- [5] **ID.—EXECUTION OF SEVERAL NOTE—VALIDITY OF—NONCOMPLIANCE WITH ORDER OF SUPERINTENDENT OF BANKS.**—The promissory note given by the directors of the bank in payment of the bonds was not invalid because it was a several note, and not a joint and several note, as the superintendent of bank had directed it should be.
- [6] **ID.—SALE OF BONDS TO DIRECTORS—ABSENCE OF RESOLUTION AUTHORIZING—ESTOPPEL.**—In an action by the superintendent of banks against the directors of an insolvent bank on their promissory note given in payment of certain bonds purchased by them from the bank prior to its insolvency, the defendants are estopped from asserting that the sale of the bonds to them was not valid because it was not authorized by a resolution of the board of directors, but that it was made merely upon an order issued by the superintendent of banks.
- [7] **ID.—PLEDGE OF SECURITIES—RIGHT TO PERSONAL JUDGMENT.**—In the absence of statute or stipulation to the contrary, the possession of pledged property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledge.

APPEAL from a judgment of the Superior Court of Kern County. Howard A. Peairs, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. I. Foster, Chas. A. Barnhart, Leon E. Morris and Louis V. Crowley for Appellants.

A. A. De Ligne for Respondent.

KNIGHT, J., *pro tem.*—The superintendent of banks of California, on behalf of the Kern Valley Bank, an insolvent corporation, obtained a judgment against the above-named defendants, severally, in amounts aggregating eighty-five thousand dollars, from which all of said defendants appeal except the defendant Sarah L. Conner, the executrix of the last will of C. L. Conner, deceased. The action is based upon a promissory note, dated October 15, 1909, drawn in favor of said Kern Valley Bank for the aggregate sum of one hundred and five thousand dollars, payable in the amounts and in the manner following: Ronald McDonald, forty thousand dollars; C. L. Conner, twenty thousand dollars; P. L. Jewett, ten thousand dollars; S. Wright Jewett, ten thousand dollars; L. P. St. Clair, twenty thousand dollars; George W. Price, five thousand dollars. All of the payors named therein signed the note except L. P. St. Clair. The plaintiff alleges that the payment of said note was secured by a pledge of ninety-five bonds, of the par value of one thousand dollars each, of the Sunset Road Oil Company, a corporation, and prays judgment against the payors, severally, for the amounts for which they respectively obligated themselves on the note, and that "said bonds be sold according to the usual course and practice of this court, and that the proceeds thereof be applied to the payment of said promissory note."

C. L. Conner died prior to the commencement of the suit, and his executrix was made a party defendant. She filed no answer. The other defendants joined in an answer, in which they urged the defenses of no consideration, fraud and estoppel. The court found against the defendants on those issues, and further found that said note was given in payment of the purchase price of the bonds which had been pledged as security for the payment of the note, and which the court found had been previously sold to the defendants by the bank. The judgment made no disposition of the pledged bonds. At the time of the execution of the note all of the payors were directors and principal stockholders of said Kern Valley Bank, and Conner and McDonald were, respectively, its president and cashier, and S. Wright Jewett and George W. Price were its assistant cashiers. On May 12, 1911, the bank became insolvent and W. R. Williams,

as superintendent of banks, took possession. The note in question and the pledged bonds were among the bank's assets.

The record discloses abundant evidence to support the findings and judgment. It shows that immediately prior to October 15, 1909, said Sunset Road Oil Company bonds, of which the bank owned a large number, had depreciated in value to the extent that the bank's capital had become impaired; that Alden Anderson, then superintendent of banks, demanded that defendants, who, as above stated, were the directors and principal stockholders of the bank, pay one hundred and five thousand dollars into the bank, in cash or its equivalent, and directed that this should be done by means of a sale from the bank to the defendants of ninety-five bonds of said Sunset Road Oil Company, at par and accrued interest, and stated that the joint and several promissory note of defendants, properly secured by the bonds so purchased, would be accepted in payment of said bonds. Anderson informed defendants that unless this arrangement was carried out he could not allow the bank to continue business. The transaction was consummated in accordance with Anderson's directions, except that a several note was executed and delivered to the bank instead of a joint and several note, and that St. Clair did not sign the note, thereby reducing the aggregate amount of the note from one hundred and five thousand dollars to eighty-five thousand dollars. Subsequently one J. W. Harper, a bank examiner, acting under the direction of Anderson, visited the bank and verified the fact that the note had been executed and the bonds pledged. Harper at that time was informed that St. Clair had not signed the note because he was out of town, but that he would do so upon his return. Across the bottom of the note was indorsed, in the handwriting of the defendant McDonald, "Secured by ninety-five bonds of one thousand dollars, being bonds No. 645 to 740, inclusive, of the Sunset Road Oil Co." These bonds were afterward listed by the defendants, as officers of the bank, in the bank's reports as pledged bonds, and the interest on the note was paid monthly by defendants up to and until one month before the bank closed, in May, 1911.

[1] The evidence above narrated clearly shows a legal sale of said bonds from the bank to the defendants, and

that said sale constituted a valid consideration for the note. The conceded purpose for which the sale was made and the note given was that the bank might be allowed to continue business. There was an impairment of the bank's assets, for which the bank could have been closed, and in order to relieve that embarrassment and to insure the bank's continuance in business the directors, at the direction of the superintendent of banks, purchased said bonds and executed said note. This was done to bring up the amount of the bank's depreciated capital to the standard fixed by the superintendent of banks. That of itself constituted a valuable consideration for the note. It has been held by numerous authorities that a note or bond executed by the directors of a bank to make good an impairment of the bank's assets, so that the bank may continue in business, is based upon a valid consideration. (*Skordal v. Stanton*, 89 Minn. 511, [95 N. W. 449]; *First Nat. Bank v. Felt*, 100 Ind. 680, [69 N. W. 1057]; *Hurd v. Kelly*, 78 N. Y. 588, [34 Am. Rep. 567]; *Murphy v. Gumaer*, 18 Colo. App. 183, [70 Pac. 800]; *National Bank of Salt Lake v. Nelson*, 38 Utah, 169, [111 Pac. 907].)

[2] The defense of fraud urged by defendants is based upon certain representations claimed to have been made by Anderson to the defendants at the time of the execution of the note, to the effect that one W. S. Tevis would also purchase a like number of bonds, and in payment thereof would execute a similar note, but that he had failed to do so, and that defendants were unaware that he had not done so until after the bank had been closed in May, 1911. This defense is insufficiently pleaded, for the reason that there are no allegations made by defendants that they relied upon said representations or that they believed them to be true. [3] However that may be, a consideration of this defense seems quite unnecessary, for the reason that both Anderson and Harper denied that any such representations were made, and the court found that their testimony was true. Any evidence to the contrary would raise a mere conflict and would not justify an interference with the findings of the trial court.

[4] The defense of estoppel is based upon an alleged rescission or repudiation of the sale of the bonds by superintendent Williams. In this respect it is alleged and was

proved that in an action independent from this one, commenced by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company, a corporation, involving the bonds of said Sunset Road Oil Company, Williams, as superintendent of banks, intervened and filed a cross-complaint, alleging "that said Kern Valley Bank was the owner of the specific bonds here involved." The fact that he did so, however, utterly fails to prove rescission or repudiation. As holder of the pledged bonds it was his duty to protect them and to controvert any claim made by third persons claiming ownership or seeking to obtain possession of said bonds, and it was not necessary in such a proceeding that Williams should allege and prove that he held said bonds merely as a pledge. As pledgee he was vested with a special property in said bonds sufficient to maintain an action against third persons for the recovery of said bonds. (31 Cyc. 824; *Treadwell v. Davis*, 34 Cal. 601, [94 Am. Dec. 770]; *Thompson v. Toland*, 48 Cal. 99; *Merced Bank v. Price*, 9 Cal. App. 177, [98 Pac. 383].) Therefore, the allegations of Williams in that action that the bank was the owner of said bonds was in accordance with the law and the facts.

[5] Appellants' contention that said note was invalid because it was not a joint and several note, as Anderson had directed it should be, is also without merit. Appellants knew of the purpose for which the note was given, and as officials of the bank they were presumably familiar with the form of the note signed by them. They afterward recognized the validity of the note by listing it among the bank's assets and by paying interest on it monthly for a year and a half. Furthermore, it is not apparent wherein appellants have been prejudiced by the execution of a several note. If it had been a joint and several note the individual defendants under the law could have been called upon to pay the full amount of the note. If anybody has suffered by the oversight it is the bank's creditors and not the appellants.

[6] Appellants also claim that the sale of the bonds was not valid because it was not authorized by a resolution of the board of directors, but that it was made merely upon an order issued by the superintendent of banks, in whom, it is claimed, the power to authorize such sale was not vested. The answer to that is that it does not appear from the rec-

ord whether or not such a resolution was in fact passed, but assuming that it was not passed, it does not lie with the defendants to take advantage of the point, for the reason that as payors of the note the law will not allow them to relieve themselves of their obligations to the bank because they, as directors of the bank, in dealing with the bank, may have willfully or otherwise exceeded their lawful authority.

[7] Appellants' final point is that the judgment is erroneous because it merely provides for the recovery of the note without reference to the security. It is contended that the judgment should direct that the security be sold and the proceeds applied to the payment of the note. The authorities, however, do not support appellants' contention. It has been repeatedly held that in the absence of statute or stipulation to the contrary, the possession of pledged property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledge, for the reason that the security is only collateral. (*Jones v. Evans*, 6 Cal. App. 88, [91 Pac. 532], wherein the authorities are reviewed.)

Judgment affirmed.

Waste, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 12, 1920, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred.

[Civ. No. 3192. Second Appellate District, Division Two.—April 12, 1920.]

W. S. EDWARDS, Respondent, v. GUARANTY TRUST & SAVINGS BANK (a Corporation), Executor, etc., Appellant.

[1] GIFTS—GIVING OF CHECK—NONACCEPTANCE BY DRAWER.—A check, given to the payee as a gift, and presented to the drawee prior to the death of the drawer, and not accepted or paid prior to such death, but payment of which was rejected for any or no reason, does not constitute a valid gift *inter vivos* or a gift *causa mortis*.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Reversed.

The facts are stated in the opinion of the court.

Vincent B. Vaughan and Lewis Cruickshank for Appellant.

F. A. Knight for Respondent.

THOMAS, J.—This is an action brought by plaintiff against defendant as executor of the estate of Benjamin Lezer Liveson, deceased, on a "rejected claim," evidenced by a check given to plaintiff by the deceased on February 28, 1916, in the sum of four thousand dollars, and intended as a gift to plaintiff.

From the record it appears that on March 2, 1916, the plaintiff deposited the check in question with the National Bank of Long Beach for collection; that on March 3, 1916, the check was presented to the bank on which it was drawn, and in which it is conceded the deceased had on deposit a sum approximating nine thousand dollars, and by said bank payment thereof refused, the check being returned marked

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1. Check as subject of gift by maker, notes, 26 Am. Rep. 684; 18 L. R. A. 855; 27 L. R. A. (N. S.) 308; L. R. A. 1918C, 340.

Check as valid gift *inter vivos*, note, Ann. Cas. 1912A, 330; as valid gift *causa mortis*, note, 10 Ann. Cas. 475.



"signature incorrect"; and that on March 4, 1916, Liveson, the drawer, died.

The case was tried by the court without a jury, and findings and judgment were in favor of the plaintiff as prayed for. The appeal is from the judgment so entered, on the judgment-roll alone. [1] There is just one point, and that one of law, in this case. The question with which we are here confronted is: Can a check, given to the payee as a gift, and presented to the drawee prior to the death of the drawer, and not accepted or paid, but payment of which was rejected for any or no reason, constitute a valid gift *inter vivos* or a gift *causa mortis*?

So far as material here, the court found as follows: That the deceased executed and delivered the said check as already stated; that at the time of the execution thereof deceased had a sum in excess of eight thousand dollars in the drawee bank, known as a "term account"; that the bank-book evidencing such account, in the possession of deceased at and prior to the time of his death, showed "that the bank reserved the right to require on term deposits six months' notice of intention to withdraw"; that said bank refused to pay the check, giving as the sole and only reason for such refusal the fact that the signature of said Liveson on said check was "incorrect"; that said bank waived the provisions requiring six months' notice of intention to withdraw from the funds of the said Benjamin Lezer Liveson, and waived the presentation of the pass-book; that the refusal to pay said check was not caused by any malicious intent of the defendant; and that said signature on said check was not incorrect.

As already intimated, the proposition which confronts us on this appeal is, whether, under the record here, the intended gift to plaintiff had become complete before the drawer's death, or whether it was merely inchoate. If the transaction between them constituted a completed gift, the money represented by the check—it being conceded here that the drawer had sufficient funds to his credit in the bank to meet the check—belonged to the plaintiff, and, under the facts found, and under this assumed state of facts, it became and was the legal duty of the bank, with respect to the drawer of the check, at least, to honor the same when so presented, although even if, for our present purpose, it

be conceded that there was no liability on the part of the bank to the holder of the check. On the other hand, if the gift had not been perfected, but was incomplete at the time of the drawer's death, the money in the bank belonged to the estate of decedent, and descended to his heirs. Under this latter assumption the plaintiff cannot recover.

Counsel for respondent in his brief says: "We do not know of any case in the United States, and we have looked carefully, where the point involved in the case at bar has been decided." We, too, have looked, and have, we think, found much law in opposition to the position taken by respondent here. In the case of *Provident Institution for Savings v. Sisters of the Poor, etc.*, 87 N. J. Eq. 424, [100 Atl. 894], the court of chancery of New Jersey had before it a case in its material aspects very similar to the case at bar. Mrs. Bowdoin, an old lady, eighty-six years of age, had died in the hospital. The day before her death she gave a check to the defendant in that case for three thousand dollars. On the same day the check was given it was presented at the bank upon which it was drawn, and payment was refused, not absolutely, but until investigation could be made. The old lady died the next day, and before any further efforts to collect the check were made. The court in that case—which is a well-considered case, and very illuminating and instructive—among other things said: "It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit when the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes, or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor. Where a check on a bank of deposit is given for value, it often operates as an equitable assignment, but such is not the case where a check is given to the payee as a pure donation. . . . It cannot be questioned in this case that if Mrs. Bowdoin had given a check on an ordinary bank of deposit, no gift would have been effected until the check had been cashed. Nor does

it make any difference what may delay or prevent the check from being cashed." We are in full accord with this reasoning and the conclusion reached. (See note, L. R. A. 1918C, 340; *Foxworthy v. Adams* (Ky.), 27 L. R. A. (N. S.) 308; *Estate of Taylor* (Pa.), 18 L. R. A. 855.) Until the money was actually paid over or transferred from Liveson's account to that of the plaintiff by the drawee bank, the gift, whether it be regarded as *inter vivos* or *causa mortis*, would be revocable, and after the death of Liveson the whole transaction would have stood legally as an incomplete gift, entirely unenforceable, at law or in equity. (*Provident Institution for Savings v. Sisters of the Poor, etc., supra.*) "To constitute a valid gift *inter vivos*, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive or symbolical delivery, without power of revocation." (20 Cyc. 1193.) In order to accomplish this, "there must be a parting by the donor with all present and future legal power and dominion over the property." (20 Cyc. 1196; *Tracy v. Alvord*, 118 Cal. 654, [50 Pac. 757]; *Pullen v. Placer County Bank*, 138 Cal. 169, [94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83]; *Simmons v. Savings Society*, 31 Ohio, 457, [27 Am. Rep. 521].) That the law of this state is as stated in the *Provident* case, *supra*, will be seen by a perusal of that and the other cases cited therein, citing and quoting from the California cases at length.

As the result, therefore, of our own independent search, we are confident that "the great weight of authority supports the proposition that one cannot make his own check . . . the subject of a gift, so that, in the absence of payment, it can be enforced against the donor or his representatives." (*Foxworthy v. Adams, supra*, and note thereunder.)

It may be conceded that the record here discloses sufficient facts so that we may infer that it was really the intention of the deceased to make a gift of the money on deposit in the bank, to the extent of four thousand dollars to plaintiff. Still, as was said in the case of *Noble v. Garden*, 146 Cal. 225, [2 Ann. Cas. 1001, 79 Pac. 883], "however much we may desire to carry out the intention of the deceased, we cannot do so in this case, because the effect would be to hold valid an oral testamentary disposition of his property,"

which, under the authorities, as we have seen, cannot legally be done.

Judgment reversed.

Finlayson, P. J., and Sloane, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred.

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[Civ. No. 3184. Second Appellate District, Division Two.—April 12, 1920.]

MARKAR H. ZARTARIAN, Respondent, v. AGAVNIE,  
ZARTARIAN, Appellant.

[1] **DIVORCE—CROSS-COMPLAINT—GROUNDS—INSUFFICIENT PLEADING.—**

Where the cross-complaint, in an action for divorce on the grounds of cruelty and desertion, details the facts relating to the separation of plaintiff and defendant, but it affirmatively appears therefrom that a cause of action for divorce on the ground of desertion or willful neglect had not accrued, either at the time of the filing of plaintiff's complaint or of defendant's cross-complaint, and there is no allegation that such acts resulted either in bodily harm or injury to the health of defendant, or a reasonable fear of one or the other, such cross-complaint does not state facts sufficient to constitute a cause of action for divorce, and a judgment for divorce in favor of the defendant is erroneous.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge. Reversed.

The facts are stated in the opinion of the court.

Florence L. Stephens for Appellant.

Arakelian M. Astor for Respondent.

THOMAS, J.—In this action plaintiff sought a divorce from the defendant on two grounds—cruelty and desertion.

Defendant by her answer denied the material allegations of the complaint.

Defendant also served and filed a cross-complaint, in which it is alleged, among other things, that for a long time after the marriage of the parties hereto they lived together in Boston, Massachusetts, during which time plaintiff carried on and maintained a prosperous shoe-repairing business in that city; that during such time plaintiff upon several occasions ran away and left defendant, and that he finally sold the business for one thousand five hundred dollars, and, taking such sum, together with some three thousand dollars which he had in the bank at that time, left "and came to California, city of Los Angeles," at which place he bought out a grocery business. That some time after plaintiff's departure from Boston, defendant, learning his whereabouts, "followed the plaintiff to the city of Los Angeles about November 15, 1915, and there effected a reconciliation, and lived with said plaintiff *up to the very day of February 12, 1916*, in the city of Los Angeles"; that plaintiff and defendant carried on said grocery business together, but finally determined that it was not paying, whereupon they decided to sell out, at which time it was understood that both of them would return to Boston; that at plaintiff's persuasion defendant preceded plaintiff to Boston, leaving Los Angeles on February 12, 1916, in accordance with the understanding arrived at, fully believing that she would be followed by her husband as soon as he sold out the business; that the business was in fact subsequently sold by plaintiff, and that plaintiff did not go to Boston as agreed, but remained in Los Angeles, there opening up a shoe-repairing business. That defendant took sick while in Boston after so returning to that city from Los Angeles, and that she, "being without means, was unable to return to Los Angeles, and was compelled to remain in Boston"; that later money was furnished her by friends, and, so aided, she returned to Los Angeles in December, 1916, but that "on November 11, 1916, while the defendant was in the city of Boston, waiting for plaintiff to come on, the plaintiff herein filed a suit for divorce in the city of Los Angeles, against the defendant herein, on the grounds of desertion." Then follows a recitation of facts showing that plaintiff's net earnings from his shoe-repairing business were "about fifty dollars per week," and

"that by their united efforts they had acquired about five thousand dollars in cash before coming to Los Angeles," but that the whole amount thereof was in plaintiff's charge. It is further shown by the cross-complaint that the issue of the marriage of the parties hereto "was one daughter, eight years old"; that while the defendant was sick in Boston, having no money with which to provide for said daughter, she sent the child, through the assistance of a mutual friend, to plaintiff herein in Los Angeles, to be cared for by him; and that plaintiff placed the said child in the Orphanage Home at Santa Monica, California. Cross-complainant, in conclusion, alleges that she is wholly dependent upon her own labor and the charity of her friends for support; that plaintiff, since defendant's return to California upon recovery of her health, has refused to inform her of the child's whereabouts, and refuses to live or cohabit with her; and that he has threatened her life, and refuses to provide for her in any way or to allow her to return to his house. Then follows a prayer for judgment on the cross-complaint, asking: (1) For a division of the common property; (2) that plaintiff be restrained from disposing of or in any way encumbering the said shoe-repairing business or the said five thousand dollars, and from taking away the said child; (3) fifteen dollars per week permanent alimony for the separate maintenance of herself and child; (4) for support during the pendency of the action, as the court might deem proper; (5) attorney's fees and costs; and (6) for general relief.

Plaintiff, by his answer to defendant's cross-complaint, denies some of the material allegations, and sets up the defense that "he is now and has been working for his brother for nine dollars per week," and that that is all he earns.

On the issues thus presented the case was tried. Findings were specifically waived by the parties. There is some doubt as to whether this can be legally done; but that point is not before us, and we therefore refrain from any discussion thereunder. Omitting formal parts, the following judgment was entered: "Therefore, it is ordered, adjudged and decreed that a decree of divorce be granted to the defendant against the plaintiff; that when one year shall have expired, after the entry of this interlocutory judgment, a final judgment and decree shall be entered, granting a divorce herein, wherein and whereby the bonds of matrimony existing be-

tween said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action. It is further adjudged that the minor child of the parties, named Alice Zartarian, shall, until the further order of the court, be in the custody of the plaintiff, and the plaintiff is directed, until the further order of the court, to keep and maintain said child at the Los Angeles Orphans' Home, at 815 El Centro Ave., Los Angeles, California."

The appeal is on the judgment-roll alone, and "from that part of the interlocutory judgment rendered by the above-named court in the above-entitled action, and herein entered on the tenth day of December, 1917, which ordered, adjudged and decreed that a decree of divorce be granted to the defendant herein against the plaintiff herein, but denied the prayer of the defendant herein for alimony and separate maintenance of herself and minor child, and which further adjudged that the custody of said minor child, named Alice Zartarian, be given to plaintiff."

Three grounds are urged by appellant for the reversal of the judgment: (1) That the judgment is not supported by the pleadings; (2) that the court erred in granting relief inconsistent with the case made by the pleadings and embraced within the issues; and (3) that the court erred in rendering a judgment for divorce in favor of the defendant.

[1] Appellant urges in support of the first point that, the trial court having found from the evidence that plaintiff was not entitled to a divorce from defendant, "but in the face of the allegations of defendant's cross-complaint and the issues raised by the answer thereto and the relief sought by the defendant, the court adjudged and decreed that a decree of divorce be granted to the defendant against plaintiff"—granting custody of the child to plaintiff—the only pleadings pertinent to this appeal, since plaintiff was denied relief on his pleadings, are defendant's cross-complaint and plaintiff's answer thereto, as well as the interlocutory judgment. It also is urged that the cross-complaint does not state a cause of action "on the ground of desertion, or any ground." With this view we are in full accord. If the cross-complaint is intended to allege facts upon which to base a cause of action for desertion or willful neglect, and even though we concede, without so holding, that it does, yet

it conclusively appears upon its face that no divorce can be based thereon, because such cause of action had not accrued, either at the time of the filing of plaintiff's complaint or defendant's cross-complaint. (Sec. 107, Civ. Code.) On the other hand, if the facts alleged in the cross-complaint be true—and for our present purposes we must so assume—still we are of the opinion that the cross-complaint fails to allege facts sufficient to constitute a cause of action against the plaintiff for extreme cruelty, as contemplated by section 94 of the Civil Code. "The particular facts relied on as constituting cruelty should be set forth in detail; it is not sufficient to allege cruelty in general terms, as in the language of the statute. However, every act complained of need not be specifically described; it is enough if sufficient facts are alleged to establish legal cruelty as a ground for divorce. . . . The acts of cruelty should be alleged with reasonable certainty as to time and place. However, the exact day and place of the occurrence of each particular act need not be alleged; and where the conduct complained of is continued and not confined to any particular time or locality, a specific allegation of time and place is impracticable and should not be required. . . . Since, to constitute a ground for divorce, cruelty must result either in bodily harm or injury to the health or a reasonable fear of one or the other, *either one or the other of these effects of the misconduct on the complainant must be alleged.*" (Italics ours.) (14 Cyc. 667 et seq.; *Maloof v. Maloof*, 175 Cal. 571, [166 Pac. 330]; *MacDonald v. MacDonald*, 155 Cal. 665, [25 L. R. A. (N. S.) 45, 102 Pac. 927]; *Smith v. Smith*, 124 Cal. 651, [57 Pac. 473]; *Nelson v. Nelson*, 18 Cal. App. 602, [123 Pac. 1099]; *Ryan v. Ryan*, 33 Mont. 406, [84 Pac. 494]; *Claunch v. Claunch* (Tex. Civ. App.), 203 S. W. 930.) There is nothing in the cross-complaint now under consideration which brings it within the provisions of the rule just quoted, and particularly does it contain no allegation bringing it within the portions which we have italicized. There being no such allegation, then it is clear that no evidence could legally be received, even if offered, in support of such contention.

Nothing is contained in the judgment-roll before us upon which the judgment appealed from may find support. This



being true, it becomes unnecessary to discuss any other point raised.

Judgment reversed.

Finlayson, P. J., and Sloane, J., concurred.

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[Civ. No. 2540. Second Appellate District, Division Two.—April 13, 1920.]

JAMES B. BLEDSOE, Appellant, v. L. C. STUCKEY,  
Respondent.

- [1] **PROMISSORY NOTE—EVIDENCE OF INDEBTEDNESS—VARYING TERMS BY PAROL.**—In an action to collect an alleged balance due on a promissory note, in the absence of any allegation or showing of fraud or mistake, it is error to permit the defendant to show by parol evidence that at the time he executed the note in question he did not owe the plaintiff the amount for which the note was given, but that he was entitled to credit on the note for the amount of certain payments made prior to that time.
- [2] **ID.—RECEIPT OF CHECK — PAYMENT — PRESUMPTION.**—While the mere receipt of a check by the creditor does not operate as payment, where the creditor acknowledges receipt of the check, does not deny that he cashed it, fails to return it or make any protest of nonpayment to the debtor, and in no way questions the transaction, he will be presumed to have collected the money.
- [3] **ID.—ACTION TO COLLECT ALLEGED BALANCE—CROSS-COMPLAINT FOR OVERPAYMENTS.**—In an action to collect an alleged balance due on a promissory note given in payment of certain cattle, the defendant may, by cross-complaint, recover from the plaintiff any sum paid by him to the plaintiff in excess of his indebtedness on the transaction.
- [4] **ID.—DEMAND FOR OVERPAYMENTS — PLEADING — ERROR WITHOUT PREJUDICE.**—In an action to collect an alleged balance due on a promissory note given in payment of certain cattle, a cross-

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1. Fraud as exception to rule excluding parol evidence to vary written contract, generally, notes, 6 L. R. A. 45, 46, 838; 17 L. R. A. 272.

2. Payment by commercial paper, notes, 69 Am. St. Rep. 346; 35 L. R. A. (N. S.) 1.

4. Recovery of money paid by mistake, notes, 50 Am. Rep. 139; 94 Am. St. Rep. 408.

complaint to recover overpayments on account of such indebtedness made through mutual mistake of the parties fails to state a cause of action where there is no averment of either demand for or nonpayment of the overpayments claimed by the defendant; but, under section 4½ of article VI of the constitution, error in overruling a general demurrer to such cross-complaint must be disregarded where it is apparent that such error was without prejudice.

- [5] **IF — FAILURE TO DEMAND OVERPAYMENTS — INTEREST RECOVERABLE**  
In the absence of a showing that the plaintiff willfully or wrongfully received the overpayments, the subject matter of the defendant's cross-complaint, and no demand having been made prior to filing the cross-complaint, defendant was not entitled to interest on the amount of his recovery under the cross-action prior to the date of filing his cross-complaint.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Reversed.

The facts are stated in the opinion of the court.

Bledson & Phipps and Leonard, Surr & Hellyer for Appellant.

A. C. Galloway for Respondent.

**SLOANE, J.**—This action was brought to recover an alleged balance of \$313.30 on a promissory note for \$2,675, and to foreclose a chattel mortgage securing the same. Defendant by his answer pleaded payment of the note in full, and by cross-complaint seeks to recover from plaintiff the sum of \$546, which defendant claims to have paid by mistake, in excess of his indebtedness on the transaction. The judgment was that plaintiff take nothing by his action, and that the defendant recover the amount of overpayment alleged in his cross-complaint.

The main contention on the appeal is as to the application of two payments, aggregating \$700, made by defendant to the plaintiff prior to the execution of the note sued on.

The transaction out of which the entire controversy grows was substantially as follows: In May, 1911, an agreement was entered into between the parties whereby the plaintiff sold to the defendant a lot of cattle and all of plaintiff's interest under a certificate of purchase from the state of

California in 280 acres of land in Kern County. The price to be paid for the land was \$400, as a fixed sum, with a further payment of \$600 if plaintiff's interest in a portion of the tract should be confirmed by the courts in pending litigation with certain adverse claimants. The number of head of livestock purchased was not specified in the original agreement, further than that defendant was to take all of plaintiff's cattle at \$22.50 per head, excepting some fifteen or twenty head, which plaintiff reserved. There is conflict in the evidence as to how many head of cattle were actually sold and delivered to defendant.

The evidence taken on the trial shows that at the date of the original agreement defendant paid to appellant on account of the transaction \$200, and in December of the same year the further sum of \$500. Subsequently, on January 15, 1912, by way of an adjustment of his indebtedness, defendant executed the promissory note sued on, for the principal sum of \$2,675, and a chattel mortgage securing the same on 120 head of the cattle purchased from plaintiff and 100 additional cattle of his own. The defendant testified that he only received 120 head of cattle from the plaintiff, and that this note and mortgage for \$2,675 covered the price he was to pay for them. It is conceded that the land litigation was determined later in plaintiff's favor, and that defendant, subsequent to the execution of the note, became liable for the additional \$600 agreed to be paid for the land, making a total liability on the entire transaction, according to defendant's contention, and as the court found, of \$3,675. Defendant claims credit on this amount for the two payments aggregating \$700 made prior to the note and mortgage, which, if allowed, with the subsequent payments shown in evidence, would leave the balance in defendant's favor as claimed under his cross-complaint. Plaintiff's testimony is to the effect that there were at least 140 head of cattle sold to defendant, besides one or two horses; that the entire indebtedness was several hundred dollars in excess of \$3,675; and that the \$700 paid prior to the execution of the note and mortgage left a balance of \$2,675 for which the note was given, besides the contingent balance of \$600 on the land.

If the only question involved was the sufficiency of the evidence to sustain the findings of the court, we would be

compelled under this conflict in the testimony to uphold the findings under the contention of defendant that his total indebtedness amounted to only \$3,675, and that he was entitled to credit thereon for the \$200 and \$500 payments made prior to the execution of the note. [1] But it is contended on behalf of appellant that the admission of evidence of these prior payments as applying toward the satisfaction of the note was error. This testimony was objected to by appellant on the ground that it was an attempt to dispute the terms of a written contract; that by the terms of the note, executed long after these payments were made, it was stipulated and agreed that at the date of the execution of the note defendant was indebted to plaintiff in the sum of \$2,675; and that an attempt to reduce the amount by credits arising from previous transactions between the parties was varying the terms of a written instrument by parol evidence. We do not see how this conclusion is to be avoided. The execution of this note was the written declaration, in the most decisive manner, of a present indebtedness of \$2,675. It was, moreover, a stating of account between the parties. (*Kinley v. Thelen*, 158 Cal. 175, 183, [110 Pac. 513].) There is no attempt to avoid it by any allegation or showing of fraud or mistake; and we do not see on what theory defendant could be permitted to say that the amount of his liability was not what the note called for, but \$700 less than that sum. It cannot be shown by parol that the sum to become payable under the terms of the note is different from that specified, nor that a certain prior account was to be deducted from the note. (Daniel on Negotiable Instruments, sec. 81.) Parol evidence cannot prove a contemporaneous condition which might reduce a specified sum payable on the note. (2 Parson on Bills and Notes, p. 506.) In *Eaves v. Henderson*, reported in 17 Wend. (N. Y.), 190, the defendant sought to set off on a suit upon his promissory note certain amounts due him on account with the plaintiff prior to the execution of the note. The court held this to be an attempt to contradict the amount expressed in the note, and that the evidence was inadmissible—even though in that case it was claimed that at the time the note was executed it was agreed by the payee that the items of the account should apply on the note.

If it be argued that if these disputed payments of \$200 and \$500 should be held to be not applicable in reducing the amount due under the note sued on they at least represent a liability for money had and received by the plaintiff without consideration, and hence recoverable by cross-complaint in this action, the answer to this is the plea of the statute of limitations set out in plaintiff's answer to the cross-complaint, these payments having been made upward of four years prior to the filing of the cross-complaint. Of course, the payments made after the execution of the note, and properly applicable as payments thereon, to which plaintiff also pleads the statute of limitations, are not subject to the bar of the statute, for the reason that they applied as payments as of the date of their receipt by plaintiff. We think, too, in further bar of the claim that these two payments are applicable in reduction of the amount of the note and mortgage, that paragraph 2 of defendant's cross-complaint is in effect an admission of a balance of indebtedness owing to plaintiff at the time of the execution of the note and mortgage of \$2,675. This indebtedness being evidenced at a date long after the payments were made, they clearly cannot be allowed in reduction of the amount so admitted to be owing by the cross-complainant and by the note itself.

Our conclusion on this point is, therefore, that on January 15, 1912, defendant's indebtedness to plaintiff was fixed, beyond evasion by parol evidence, at the sum of \$2,675, as shown by the note of that date.

It also appears by undisputed evidence that subsequently, by a favorable termination of the litigation on the land, the further contingent sum of \$600 became due from defendant to plaintiff. This last amount, as the admitted facts show, was increased by certain accruals of interest and installments on the land to the sum of \$692. This sum was paid on April 19, 1915, however, thus disposing of that item. It only remains to be seen what payments are properly to be credited on the promissory note, and to any overpayment which defendant may be entitled to recover.

From June 12, 1911, to October 27, 1914, payments were made in an aggregate amount of \$3,000, which, it clearly appears, are rightly credited to defendant. [2] In addition to proof of these payments, defendant introduced a letter from plaintiff of date August 24, 1914, in which the latter

acknowledges the receipt, on or about that date, of another check from defendant for \$300. None of the witnesses seemed to have a very distinct knowledge as to this check, and the check itself, canceled or otherwise, was not produced. Defendant had no definite recollection regarding it, and stated that he did not know whether it was his own check or one drawn in his favor by someone else and indorsed over to plaintiff. Plaintiff does not deny having received it, or that he collected on it. Appellant is supported by the authorities cited in the contention that the mere receipt of a check by the creditor does not operate as payment. But in a case where, as here, the creditor acknowledges the receipt of the check, does not deny that he cashed it, fails to return it or make any protest of nonpayment to the debtor, and in no way questions the transaction, he will be presumed to have collected the money. The court was justified in crediting the defendant with the amount.

These payments applicable on the defendant's account aggregate a total amount of \$3,300. The total sum due under the terms of the note, including interest calculated on the basis of the various partial payments, is \$3,104.49. This leaves an overpayment of \$195.51 subject to recovery under defendant's cross-complaint, if properly pleaded, instead of \$546, as allowed by the judgment.

Appellant, however, contends that his demurrer to the cross-complaint should have been sustained, both on the ground that the facts pleaded were not proper matter of cross-complaint, and on the ground that the facts alleged were not sufficient to constitute a cause of action. [3] We think the facts alleged constitute a proper cross-complaint. They all grew out of a transaction of which the note sued on in the main action was a part. This is at least true as to all moneys paid by defendant to plaintiff on which credits are herein allowed to respondent. Treating the land purchase as entirely a separate transaction from the liability arising on the note, as contended for by appellant, it appears to have been adjusted separately between the parties. The \$692 payment made April 19, 1915, is conceded to have been in settlement of the balance due on the land trade. All the other payments made subsequent to the execution of the note were properly credited thereon, and any overpayment made by respondent is included in the \$1,000 pay-

ment of October 27, 1914, which was admittedly made on the note; and the claim to recover the amount of overpayment arises on an overpayment on the note—the contract sued on in plaintiff's action. In any event, defendant's action upon his affirmative pleading is in effect for money had and received by plaintiff, and arises on an implied contract to repay. The facts alleged constituted proper matter of counterclaim under subdivision 2 of section 438 of the Code of Civil Procedure, if not of cross-complaint. We see no reason, nor any prejudice resulting to appellant, to prevent treating it as a counterclaim. "It is not what a pleading is called, but the facts which it sets up that determines its character. Its character and sufficiency will be determined by the court from the facts alleged in it." (*McDougald v. Hulet*, 132 Cal. 155, 160, [64 Pac. 278, 280]; *Holmes v. Richet*, 56 Cal. 307, [38 Am. Rep. 54]; *Gregory v. Bovier*, 77 Cal. 121, [19 Pac. 232]; *Meeker v. Dalton*, 75 Cal. 154, [16 Pac. 764].)

[4] The demurrer, for want of facts in the cross-complaint, however, we think should have been sustained. There is no averment of either demand for or nonpayment of the overpayments claimed by the defendant. There is nothing in the cross-complaint to indicate that the excess payments on the plaintiff's demand were made or received other than through mutual mistake of the parties. As is said under a similar state of facts in *Dunham v. McDonald*, 34 Cal. App. 744, [168 Pac. 1063]: "He does not allege that the cross-defendant had any better knowledge of the circumstances and facts than he had. Under such circumstances we think that a demand for payment was a prerequisite to the filing of the cross-complaint. . . . It seems too clear for argument that it was necessary also to show by appropriate allegation in the cross-complaint that the money claimed by the defendant of the plaintiff had not been paid." While, however, the overruling of plaintiff's demurrer was error, we think it was error without prejudice, and may be disregarded under the provisions of section 4½ of article VI of the constitution.

In the first place, the failure to allege nonpayment, and perhaps, also, the failure to allege demand before bringing suit, was cured by defendant's denial, in answer to the cross-complaint, that there had been any amount paid in

excess of the balance due on the note and mortgage, or that there was any amount whatever due or owing the defendant. While the more common application of the rule of curing defects in a complaint by averments in the answer contemplates an affirmative allegation in the answer of the precise fact omitted from the complaint (*Pomeroy on Remedies*, sec. 579), it seems to have been the practice in this state to treat an express denial by answer of the omitted matter as curing the omission. (*Vance v. Anderson*, 113 Cal. 537, [45 Pac. 816]; *Abner Doble Co. v. McDonald*, 145 Cal. 641, [79 Pac. 369]; *Flinn v. Ferry*, 127 Cal. 648, [60 Pac. 434].) This rule that omitted allegations of a complaint may be aided by averments in the answer applies even though a demurrer to the sufficiency of the complaint has been erroneously overruled. (*Daggett v. Gray*, 110 Cal. 169, [42 Pac. 568]; *Savings Bank v. Barrett*, 126 Cal. 413, [58 Pac. 914]; *Kreling v. Kreling*, 118 Cal. 413, [50 Pac. 546]; *Cohen v. Knox*, 90 Cal. 266, [13 L. R. A. 711, 27 Pac. 215]; *Donegan v. Houston*, 5 Cal. App. 632, [90 Pac. 1073].) Moreover, the cross-defendant was clearly not taken at a disadvantage or in any way prejudiced by failure to allege non-payment of money he denies ever having received or owed; and it is a fair presumption that it would have been a futile act on the part of defendant to have demanded payment of this claim before filing his cross-complaint. This is not a case where a demand was a necessary prerequisite to the accrual of the cross-defendant's liability. The only object of the demand in such a case as this is to give the adverse party an opportunity to make settlement, if he desires, without being subjected to a suit; and where, as here, the action between the parties is already pending, and the cross-demand arises from the same transaction, it is questionable if a demand is necessary (*Sharkey v. Mansfield*, 90 N. Y. 227, [43 Am. Rep. 161]); and, in any event, the failure to plead it is of trifling consequence.

[5] We are of the opinion, however, that in the absence of a showing that the plaintiff willfully or wrongfully received these overpayments from defendant, and no demand having been made prior to filing the cross-complaint, defendant was not entitled to interest on any amount of his recovery under the cross-action prior to the date of filing his



cross-complaint, and, as already indicated, there was error in crediting certain payments on the note.

The judgment is reversed, with directions to the trial court to retry the issues as to amount of recovery on the cross-complaint.

Finlayson, P. J., and Thomas, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 12, 1920.

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[Civ. No. 3354. First Appellate District, Division Two.—April 18, 1920.]

FAIRMONT CREAMERY COMPANY (a Corporation),  
Appellant, v. LOS ANGELES ICE & COLD STORAGE COMPANY (a Corporation), Respondent.

[1] PLEDGE—CONSIGNMENT OF GOODS TO FACTOR—RIGHTS OF BONA FIDE PLEDGEE FOR VALUE.—Where goods are consigned directly to a factor, the bill of lading designating him as the consignee, and upon the arrival of the goods and his securing possession of them they are pledged to one who receives them in good faith, in the ordinary course of business, and for value, the real owner cannot set up his title to defeat such pledge, notwithstanding the factor obtained possession of the goods from the carrier without showing a bill of lading and going through the usual course of business and the pledgee did not call for the bill of lading or some indicia of ownership in taking the goods as a pledge, but accepted the factor's statement that he was the owner.

APPEAL from a judgment of the Superior Court of Los Angeles County. L. H. Valentine, Judge. Affirmed.

The facts are stated in the opinion of the court.

Henry K. Norton and Roy V. Rhodes for Appellant.

Sidney J. Parsons for Respondent.

LANGDON, P. J.—This is an appeal by the plaintiff from a judgment against it rendered in an action for conver-

sion of a carload of eggs. When the action was first tried judgment was rendered for the plaintiff, from which judgment the defendant appealed. Upon the appeal the judgment was reversed. The decision upon the first appeal is reported in volume 33 Cal. App. 414, [165 Pac. 553]. The case was then retried, resulting in a judgment for the defendant, from which judgment this appeal is prosecuted.

The important facts, as stated on the first appeal, also appear from the present record and are as follows:

On June 17, 1913, one Fred F. Lambourn was engaged in business at Los Angeles as a broker selling merchandise on behalf of consignees and also as a dealer in merchandise on his own account. He had been in business for several years. In August, 1913, he was adjudged a bankrupt. The plaintiff was engaged in the produce business at Omaha, Nebraska, and had been doing business with Lambourn as a broker since April, 1911. On June 5, 1913, Lambourn telegraphed plaintiff that he had sold a car of eggs. The telegram was as follows: "Sold car candled current receipts fifty-three and over small dealers eighteen cents track. Wire car number and when can ship." On June 7, 1913, the plaintiff shipped the carload of eggs thus ordered and made the consignment directly to and in the name of Lambourn. The car arrived at Los Angeles on June 17, 1913. When the merchandise was shipped from Omaha a bill of lading therefor, showing the shipment from plaintiff to Lambourn, was received from the railroad company, and was mailed by the plaintiff to Lambourn. According to the testimony of plaintiff's sales manager this was done that Lambourn "might obtain possession of the eggs for the purpose of making delivery to the various parties to whom he had sold as our broker." At the same time the plaintiff forwarded through the Omaha National Bank to that bank's correspondent in Los Angeles a draft on Lambourn for \$2,160, the purchase price of the eggs. The draft was not paid. On June 17, 1913, Lambourn informed the superintendent of the defendant that he had a car of eggs and wanted a loan upon it. The eggs were taken into the possession of the defendant and placed in its warehouse, and defendant issued to Lambourn a warehouse receipt therefor. Thereupon, on the same day, the defendant loaned to Lambourn two thousand three hundred dollars, taking his note

therefor, together with an agreement pledging the car of eggs to the defendant as collateral security for the payment of the note and any other liability or liabilities of Lambourn to the defendant, "due or to become due or that may be hereafter contracted." In making this loan the defendant made no special inquiry as to the ownership of the merchandise and did not see or ask to see the bill of lading. It simply accepted Lambourn's statement that he owned the car of eggs. It had no knowledge concerning the ownership of the property. On September 10, 1913 (after the bankruptcy of Lambourn), the defendant sold the eggs for \$2,880. On September 24, 1913, the plaintiff made a demand for the same upon the defendant, claiming to be the sole owner, and offered to pay storage charges on the eggs. Upon these facts (the statement of which is taken from the opinion rendered upon the first appeal), all of which also appear clearly from the record now before us, the district court of appeal for the second appellate district, on April 14, 1917, decided that Lambourn was a factor, and as such had ostensible authority to deal with the goods of the principal as with his own in transactions with persons not having notice of the actual ownership. (Civ. Code, secs. 2026, 2369.) The appellate court also decided that section 2991 of the Civil Code was applicable to the facts shown; that the eggs were consigned to Lambourn to be transferred by him to the purchaser of the same; and that "in the meantime they could not be identified as belonging to any purchaser, and the property remained in possession of Lambourn for the purpose of making those transfers." The opinion upon the first appeal continues further: "Counsel for respondent further suggests the fact that the defendant did not inquire of Lambourn as to the form of the bill of lading, and never saw that document until the day of the trial. Therefore, they say, that as to them Lambourn had mere possession, and that appellant cannot in any sense be said to be a pledgee who received the property in good faith in the ordinary course of business. We think that it was not necessary for appellant to examine the bill of lading. By acting upon the assumption that Lambourn had such bill of lading and without examining the same for itself, appellant took the risk that he might not have any such document in his possession. But since he did have it, the

case is the same as if appellant had examined it and relied upon the evidence obtained by its own inspection."

[1] In so far as the facts are substantially the same upon the second appeal as upon the first appeal, the decision upon the first appeal is the law of this case. However, appellant urges upon our attention two additional points in the evidence upon the second trial. It states them to be:

"1. That Lambourn had a bond up with the railroad company so that he might obtain cars without showing a bill of lading and going through the usual course of business.

"2. Lamoreaux, superintendent of cold storage for the defendant, testified that the board of directors of the L. A. Ice & Cold Storage Company had adopted a policy of transacting business, such as was done in this case with Lambourn, with only regular customers and not with strangers. And further he testified to the effect that the reason that they did not call for the bill of lading or some indicia of ownership in taking these goods as pledge for the loan, was because they relied upon the fact that they were dealing with an old customer."

It is contended that as the bill of lading was not made "to order" and was not negotiable, therefore, this fact would have put the defendant upon notice if it had examined the same. We find no merit in this contention. The plaintiff consigned the goods directly to Lambourn and the bill of lading designated him as the consignee. It is true that as between the defendant and Lambourn, this bill of lading transferred only the right to the possession of the goods and not the full title, but it is this very possession for the purpose of transferring title to others which is the basis of the pledgee's rights under section 2991 of the Civil Code. It is true that because the bill was non-negotiable Lambourn was obliged to wait until he secured possession of the goods before pledging them. If the bill had been negotiable, he could have dealt with it before the goods arrived and cut off all equities, but he did not attempt to do this. He did not negotiate the bill. He waited until the goods arrived and properly secured possession of them, because the eggs were billed to him. If the defendant had examined the bill of lading, it would have discovered nothing which would have militated against its rights under section 2991 of the Civil Code. The bill of lading merely showed that

Lambourn was entitled to the possession of the eggs. The limited purpose of the possession did not appear from the bill of lading, and was enforceable only as between the plaintiff and Lambourn, or parties having knowledge of the facts. The plaintiff could have protected itself fully by attaching the bill of lading to the draft which it sent to the bank for collection. It did not choose to do this.

The matter of the effect of the non-negotiability of the bill of lading is argued by appellant in several connections, but the discussion herein disposes of the matter in its various applications. The other matter urged by the appellant we consider to be without merit.

The judgment is affirmed.

Brittain, J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred.

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[Crim. No. 719. Second Appellate District, Division Two.—April 13, 1920.]

In the Matter of the Application of F. F. GILLETT for a Writ of Habeas Corpus.

- [1] **ARREST AND BAIL—CONVERSION IN COURSE OF EMPLOYMENT—ESSENTIAL OF AFFIDAVIT.**—An essential of an affidavit, to justify an order of arrest under subdivision 2 of section 479 of the Code of Civil Procedure, is that the misappropriation or conversion of the property occurred in the course of the defendant's employment as agent of plaintiff. It is not sufficient to state that he was such agent at the time the property came into his possession.
- [2] **ID.—FRAUDULENT CONVERSION—WANT OF KNOWLEDGE BY AFFIANT—SUFFICIENCY OF AFFIDAVIT.**—An affidavit charging fraudulent conversion substantially in the language of subdivision 4 of section 479 of the Code of Civil Procedure is insufficient to justify an order of arrest, where it is apparent therefrom that affiant has no personal knowledge of how or why or when, if at all, defendant disposed of plaintiff's property.

PROCEEDING on Habeas Corpus by a person detained in the custody of the sheriff under an order of arrest issued by virtue of the provisions of section 479 of the Code of Civil Procedure. Petitioner discharged.

M. M. Meyers and John P. Hogan for Petitioner.

No appearance for Respondent.

SLOANE, J.—The petitioner is seeking under this writ to secure his discharge from the custody of the sheriff of Los Angeles County. The sheriff justifies the detention of petitioner under an order of arrest issued by the superior court of Los Angeles county by virtue of the provisions of section 479 of the Code of Civil Procedure for arrest and bail in civil actions.

It is contended by petitioner that the affidavit under which the arrest was ordered is not sufficient to give the court jurisdiction to make the order.

The affidavit purports to be in pursuance of subdivisions 2 and 4 of said section 479. Under subdivision 2 it is apparently sought to charge the defendant with having converted to his own use and embezzled money or property belonging to the plaintiff, while the same was in defendant's custody in a fiduciary employment as agent of plaintiff, and in the course of his employment as such agent. Under subdivision 4 it is attempted to charge the defendant with fraud in concealing or disposing of the property for the detention or conversion of which the action is brought. At any rate, if the affidavit does not state facts bringing the matter within these provisions of the subdivisions named, it is wholly and hopelessly futile.

The matters alleged in the affidavit, so far as they are material in determining the objections to its sufficiency, are as follows: "R. H. Chappel, being first duly sworn, deposes and says: I am the Assistant Treasurer of the Standard Scale & Supply company, a corporation, plaintiff herein; that at all of the times herein alleged the property hereinafter described was the property of plaintiff herein, until the fraudulent conversion of the money arising from the sale thereof by defendant, with whom all of said personal property was placed by plaintiff, as plaintiff's agent. . . .

That defendant herein, at times actually unknown to affiant and plaintiff corporation, but believed to be on or about two years next preceding the bringing of the suit herein, did unlawfully, wrongfully and fraudulently convert to his own use and dispose of and sell the hereinbefore described personal property, with the intent to cheat and defraud plaintiff of said personal property and the value thereof; that defendant has received the full value of said property in money; and has unlawfully, wrongfully and fraudulently refused to pay to plaintiff, or account to plaintiff, for said money, and no part of the money so received therefrom by the defendant has ever been delivered to or paid to plaintiff . . . ”

[1] It is apparent that an essential of an affidavit, to justify the order of arrest under subdivision 2, is that the misappropriation or conversion of the property occurred in the course of the defendant's employment as agent of plaintiff. The fact that he was at any time such agent is only impliedly stated, by referring to the defendant as one “with whom all of said property was placed by plaintiff, as plaintiff's agent.” This averment, such as it is, refers to the time when the property was intrusted to defendant. The time when the alleged misappropriation took place is expressly declared to be unknown to affiant or plaintiff, and is nowhere intimated that the fiduciary relation existed at that time, or that the acts complained of were in the course of his employment.

[2] As to the averment charging fraudulent conversion under subdivision 4 of the section, it may be said to be substantially in the language of the statute. It has been held that an affidavit charging the acts substantially in the language of the statute is sufficiently specific if the allegations are made upon affiant's own knowledge of the facts. (*Matter of Caples*, 26 Cal. App. 786, [148 Pac. 795]; *In re Keene*, 34 Cal. App. 263, [167 Pac. 194].) In the latter decision the court says: “The affidavit upon which an order of arrest in a civil action is asked need not state the evidentiary facts upon which the principal fact rests, if instead thereof the affidavit follows the statute and declares in positive terms that such principal fact exists”; but it is further added in the opinion that “this is subject of course to the qualification that if the facts stated in the affidavit show that necessarily affiant is acting only on information and

belief other than actual knowledge, then the evidentiary facts must be stated." The affiant in this case describes himself as the assistant treasurer of the plaintiff corporation, as of the date of the affidavit. It does not appear how far back his connection with the plaintiff company extended, or whether he had any personal knowledge of its transactions; and, as already pointed out, he expressly avers that the alleged wrongful acts of defendant occurred "at times actually unknown to affiant and plaintiff corporation, but believed to be on or about two years next preceding the bringing of the suit herein." How long prior to the date of the affidavit the suit was begun does not appear. In any event, it must be apparent that affiant had no personal knowledge of how or why or when, if at all, defendant disposed of plaintiff's property. It is at least a fair presumption that if he had no knowledge during a period of more than two years after the happening of the event that there had been a conversion of plaintiff's goods he was not in a position to testify on his own knowledge of the manner and nature of the conversion. Such presumption was entertained in *Ex parte Fukumoto*, 120 Cal. 316, [52 Pac. 728], where it is said: "Several of the statements of fact are made expressly on information and belief, while many others, although not so stated in terms, are of a character which could in their nature only have been so made, whereas the facts upon which such information and belief are founded are in no instance given. In this the affidavit fails to comply with one of the express requirements of the statute"—Code of Civil Procedure, section 481.

It is difficult to understand how, even on the most positive statement of personal knowledge, the bare averment that the act was done fraudulently can be accepted as a statement of fact in support of an order of arrest, whereby in a civil action a defendant is deprived of his liberty, when the same statement would constitute an insufficient averment of the fraud in the complaint to recover the money or property claimed to be misappropriated. (*Heller v. Dyerville Mfg. Co.*, 116 Cal. 127, [47 Pac. 1016]; *Truett v. Onderdonk*, 120 Cal. 581, [53 Pac. 26].) Fraud is the gist of this proceeding. Its existence should be determined from the evidence stated, and not as a conclusion of the affiant. "Where no prosecution for perjury would lie against affiant, predicated



upon the falsity of any matters set forth in the complaint, it is radically insufficient." (*Peterson v. Nesbitt*, 11 Cal. App. 370, [105 Pac. 133].) In *Ex parte Fukumoto, supra*, the court, while impliedly conceding that allegations of fact made in the words of the statute are sufficiently stated, in discussing the requisite proof of fraud under an affidavit in arrest and bail, says: "It is not enough to assert such fraudulent intent in general terms. Like the statement of proof of a cause of action for fraud, the specific facts relied on must be shown, that the court itself may deduce the fraud, and not leave the question of the sufficiency of the facts to be passed upon by the party. (*Morris v. Talcott*, 96 N. Y. 107.) If this is so in cases not involving the liberty of a citizen, *a fortiori* is it demanded in a prosecution like this. Otherwise the party is constituted the arbiter of his own rights." "A warrant of arrest cannot be issued on hearsay, nor upon any statement, however positive, founded upon hearsay." (*Lay v. Superior Court*, 11 Cal. App. 558, [105 Pac. 775].) It may be added that such warrant of arrest cannot be made upon the mere statement of a conclusion of law.

In this case the defendant, petitioner here, seems to have come lawfully into the possession of the property involved. It does not appear when it was delivered to him, but it is admitted that for a period of two years or upward the plaintiff corporation had had no knowledge of its condition or whereabouts, or the circumstances under which the petitioner disposed of it. It would be the establishment of a dangerous precedent to permit the petitioner here to be deprived of his liberty upon the bare statement of a conclusion or opinion of the assistant treasurer of the company that there was a fraudulent conversion of the goods.

The petitioner is discharged.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 3317. First Appellate District, Division One.—April 14, 1920.]

A. L. DIBBLE, Respondent, v. SAN JOAQUIN LIGHT & POWER CORPORATION (a Corporation), et al., Appellants.

- [1] NEGLIGENCE—DESTRUCTION OF GRAIN BY FIRE—EVIDENCE—PRIMA FACIE CASE—REBUTTAL.—In this action for damages for the destruction by fire of certain grain belonging to plaintiff, the evidence introduced by plaintiff made out such a *prima facie* case as called upon the defendants to rebut the necessary inferences arising from the testimony, and the motion of the defendants for a nonsuit was properly denied.
- [2] ID.—CONNECTION OF WORKMEN WITH DEFENDANTS' BUSINESS—PRIMA FACIE SHOWING OF PRINCIPAL AND AGENT.—The plaintiff, in such action, having shown that the men who were responsible for the starting of the fire appeared at the time to be engaged in some kind of work connected with the business of the defendants, made a *prima facie* showing of the existence of the relationship of principal and agent between the corporation defendants and the workmen, which, in the absence of evidence to the contrary, was ample to support the findings of the trial court that such relation existed at the time of the fire.
- [3] ID.—ORIGIN OF FIRE—INFERENCE FROM EVIDENCE.—While there was no direct evidence in this case as to the origin of the fire, the trial court had the right to make any logical, reasonable deduction, which the admitted facts and the undisputed testimony permitted, and it was a fair inference that the flames which destroyed plaintiff's property were communicated thereto by the fire which originated on the right of way of defendants, and which had its origin in one or the other of the instrumentalities used by defendants' employees in their work.
- [4] ID.—FAILURE TO EXTINGUISH FIRE.—The employees of the defendants were guilty of gross carelessness in not properly controlling and extinguishing the fire when their attention was directed to the probabilities of its spreading, it having at the time been burning in tall, dry grass which extended to plaintiff's field.
- [5] ID.—INFERENCES DRAWN BY TRIAL COURT—REVIEW ON APPEAL.—It is not within the power of the appellate court to disregard, or set aside, the findings of the trial court where, as against the deductions drawn by the trial court, which seem eminently reason-

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2. Master's liability to third person for damage by fire started by servant, notes, Ann. Cas. 1914A, 1102; Ann. Cas. 1917B, 1054.

able, no other inferences founded on facts proved in the case find support.

- [6] **ID.—SUBROGATION—ASSIGNMENT—PARTIES—PLEADING.**—The insurance company, after payment of the loss caused by the negligence of a third person, being subrogated to the rights of the insured to the extent of its payment, may assign that right to the insured; and in a subsequent action by the insured against such third person, it is not necessary that the insurance company be joined in the action, either as plaintiff or defendant, or that the assignment by the insurance company to plaintiff be pleaded.

**APPEAL** from a judgment of the Superior Court of Fresno County. Geo. E. Church, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Short & Sutherland and Carl E. Lindsay for Appellants.

Goodfellow, Eells, Moore & Orrick and George K. Ford for Respondent.

**WASTE, P. J.**—This is an appeal by the defendants from a judgment awarding plaintiff damages for the destruction by fire of certain grain belonging to him, caused through the negligence of the defendants. The case was tried before the court without a jury. It was stipulated that if judgment went against one of the defendants, it might be entered against both of them. At the conclusion of plaintiff's case, the defendants moved for a nonsuit. The motion was denied, whereupon the defendants declined to offer any evidence. The findings of the trial court followed the allegations of the complaint. In seeking a reversal of the judgment the appellants urged two grounds—first, the insufficiency of the evidence to justify the findings and the judgment based thereon, and, second, that the plaintiff is not the real party in interest in this action, at least to the amount of \$3,025.60.

It is admitted that the plaintiff was the lessee of certain lands upon which he had grown a crop of wheat and barley. The defendants owned and maintained a right of way, adjacent to the land of plaintiff, over which it operated a power line. From the testimony of Mr. McCabe, who was called as a witness on behalf of the plaintiff, it appears that on the afternoon of June 8, 1915, he was passing along the

county road, which was located a few feet westerly from the power line. Two men, Schultz and Moore, were at that time in view. One of them was in the act of descending from one of the poles, supporting the power line, while the other was on the ground near the foot of the pole. A team and wagon, which McCabe identified as belonging to the defendant power corporation, was standing near by. A small fire, three or four feet across, was then burning in the tall, thick, dry grass which extended to plaintiff's field, a distance of about two hundred feet, and in which plaintiff's grain was standing and ready for the harvest. The wind was at that time blowing from the fire in the direction of plaintiff's field. About twenty feet from the place where the fire was burning, and so situated that the wind would carry sparks from it toward the fire, McCabe observed a fire-pot, with what seemed to be coals of fire in it. What appeared to be a torch, such as is used by plumbers, was lying just where the blaze was started. The fire at this time could have been readily extinguished. When McCabe approached, the two men were standing near it with sacks or cloths in their hands. McCabe said, "Boys, if you ain't careful, you will have a big fire here on your hands," to which one of the men replied, "Never mind, partner, we will attend to the fire." Neither of the men, however, made any attempt to extinguish, or stay, the spread of the flames, which, owing to an increasing wind, almost immediately spread rapidly until they reached and consumed plaintiff's grain.

[1] It is the contention of the appellants that this evidence was wholly insufficient to prove that the fire in question was started by the negligence of the defendants, or that it was permitted to spread and reach the grain upon plaintiff's land, because of any carelessness whatever on the part of defendants, or either of them. We are of the opinion, however, that the plaintiff made out such a *prima facie* case as called upon the defendants to rebut the necessary inferences arising from the testimony, and that the motion for a nonsuit was properly denied.

[2] Appellants first argue that as there was no direct testimony that either Schultz or Moore were employed by the defendants, and no evidence as to the kind of work they were doing at the time of the fire, they may have been

strangers to the defendants and not in any way connected with them. This contention cannot be upheld. The men appeared to be engaged in some kind of work connected with the business of the defendants. They were working on the right of way of defendant's power line. One of them was descending from one of the power line poles. The other was close at hand. No other men were in sight. The implements for their work were scattered about. The firepot, the torch, and the wagon and team, were all indicia of their employment. The facts were sufficient, in our judgment, to make a *prima facie* showing of the existence of the relationship of principal and agent between the corporation defendants and the workmen, which, in the absence of evidence to the contrary, was ample to support the findings of the trial court that such relation existed at the time of the fire. (1 Labatt on Master and Servant, sec. 22, pp. 69, 73.) The fact that one is performing work and labor for another is *prima facie* evidence of an employment and supports a presumption that such person is the servant and employee of the other, in the absence of evidence to the contrary. (*King v. Hercules Powder Co.*, 39 Cal. App. 223, [178 Pac. 531]; *Indiana etc. Ry. v. Adamson*, 114 Ind. 282, [15 N. E. 5]; *Waalder v. Great Northern Ry. Co.*, 22 S. D. 256, [18 L. R. A. (N. S.) 297, 117 N. W. 140]; *Robinson v. Doe*, 224 Mass. 319, [112 N. E. 1007]; *Bush v. Southern Ry.*, 63 S. C. 96, [40 S. E. 1029]; *Howell v. Mandelbaum & Sons*, 160 Iowa, 119, [Ann. Cas. 1915D, 349, 140 N. W. 397].)

[3] Appellants also claim that there is no evidence to show that the employees in question either started the fire or failed to extinguish it, or that they negligently permitted it to spread. While it is true there is no direct evidence as to the origin of the fire, the trial court had the right to make any logical, reasonable deduction, which the admitted facts and the undisputed testimony of the witness McCabe permitted. (*Davis v. Hearst*, 160 Cal. 143, 176, [116 Pac. 530].) It is a fair inference that the flames which destroyed plaintiff's property were communicated thereto by the fire, which originated on the right of way of defendants, and which had its origin in one or other of the instrumentalities used by defendants' employees in their work. (*Reuter v. San Pedro etc. Co.*, 37 Cal. App. 277, 283, [174 Pac.

927]; *St. Paul Fire etc. Co. v. Southern Pacific Co.*, 30 Cal. App. 140, 142, [157 Pac. 247]; *Fay v. Cox*, 45 Cal. App. 696, [188 Pac. 623]; *Toledo etc. Co. v. Fenstermaker*, 163 Ind. 534, [72 N. E. 561, 562]; *Roundtree v. Mt. Hood etc. Co.*, 86 Or. 147, [168 Pac. 61].) [4] It is equally clear to us that the employees of defendants were guilty of gross carelessness in not properly controlling and extinguishing the fire when their attention was directed by McCabe to the probability of its spreading. It was burning in tall, dry grass near the adjacent fields of stubble and grain, and it should not have required any warning to apprise them of this imminent danger.

[5] The deductions drawn by the trial court are not illogical, or inherently unsound, either as to the employment of Schultz and Moore or as to the origin and source of the fire. Whether or not the workmen were the servants of the power company was so peculiarly within the knowledge of the defendants that the plaintiff was not required to make as strong showing in that regard as might have been otherwise required. As against the deductions drawn by the trial court, which seem eminently reasonable, no other inferences founded on facts proved in the case find support. It is not within the power of this court to disregard or set aside the findings thus supported. (*Ryder v. Bamberger*, 172 Cal. 791, 799, [158 Pac. 753]; *County of Alameda v. Tieslau*, 44 Cal. App. 332, [186 Pac. 398].)

On cross-examination of the plaintiff it was developed that the grain was insured against fire in the Hartford Fire Insurance Company, which paid plaintiff \$3,025.60, the amount due under its policy. On redirect examination plaintiff established that, before the commencement of the action, the insurance company assigned to the plaintiff all rights and causes of action against the defendants arising out of loss or damage occasioned by the fire. A written assignment was admitted in evidence over the contention of the defendants. the objection being that the cause of action was not assignable and that the assignment had not been pleaded. The defendants then made application to the court to amend their answer by setting up a further defense, which, in substance, was that the action had not been brought, and was not being prosecuted, in the name of or by, the

real party in interest. The court denied the application to amend.

Appellants complain of the act of the court in admitting the assignment in evidence and its further action in refusing permission to file the amendment to the answer. [6] Their contention, first, is that the insurance company, upon the payment of the loss of the plaintiff, was subrogated to plaintiff's rights, and became the real party in interest to the extent of its payment, and that the cause of action which the insurer had, because of its subrogation to the rights of plaintiff, was not assignable. Appellants seek to invoke the rule of law relating to actions for death or personal injuries, and for damage to property under statutes different from ours. Section 954 of the Civil Code has effected a change in the common-law rule of the nonassignability of choses in action. One arising out of either the violation of a right of property or one arising out of an obligation or contract may now be transferred. (*Stapp v. Madera Canal & Irr. Co.*, 34 Cal. App. 41, 46, [166 Pac. 823].)

The next point urged by appellants is that the insurance company should have been joined in the action, either as plaintiff or defendant. We find no merit in this contention.

It was not necessary even that the assignment by the insurance company to the plaintiff should have been pleaded. The insurer merely had a cause of action arising by way of subrogation or equitable assignment. (*Caledonia Ins. Co. v. Northern Pacific Ry. Co.*, 32 Mont. 46, 49, [79 Pac. 544].) This assignment by operation of law, and the reassignment by the company to plaintiff, left the claim as it was originally and involved probative matters that had no place in the pleading. (*Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 373, 377, [114 Pac. 1026].) The action was, therefore, properly commenced by the plaintiff alone.

The judgment is affirmed.

Richards, J., and Knight, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred.

[Crim. No. 693. Second Appellate District, Division Two.—April 14, 1920.]

**THE PEOPLE, Respondent, v. LEWIS H. GILMAN,  
Appellant.**

- [1] **CRIMINAL LAW—MURDER OF ARRESTING OFFICER—CONTEMPORANEOUS ATTEMPT ON LIVES OF OTHERS—RES GESTAE—EVIDENCE.**—In this prosecution for the murder of a special deputy sheriff, who was shot and killed by the defendant after he had taken the latter into custody for committing a breach of the peace, the fact that the defendant, without a moment's hesitation or delay, rushed from the scene of the first shooting, in an attempt upon the lives of members of the family in whose presence he had committed the breach of the peace for which he was taken into custody, was competent evidence tending to show that the motive which impelled him in both instances was anger and resentment growing out of the previous quarrel and altercation in which they had all participated.
- [2] **ID.—RESISTANCE TO UNLAWFUL ARREST—HOMICIDE—DEGREE OF CRIME.**—To admit the application of the doctrine that where in resistance of an illegal arrest the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter, there must be evidence not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant.
- [3] **ID.—VERBAL NOTICE OF ARREST FOR MISDEMEANOR—KILLING OF OFFICER.**—A person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor cannot respond by shooting to death the officer and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint.
- [4] **ID.—SUBMISSION TO ARREST—SUBSEQUENT HOMICIDE—DEGREE OF CRIME—INSTRUCTIONS.**—The defendant having submitted to the arrest and thereafter, while out of the physical control of the officer, having shot and killed the latter, the trial court properly refused an instruction in behalf of the defendant to the effect that where the evidence shows a homicide is committed in resisting an unlawful arrest, the ground of conviction is limited to manslaughter.

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2. Homicide in resisting arrest, notes, 66 L. R. A. 353; 33 L. R. A. (N. S.) 143.



APPEAL from a judgment of the Superior Court of San Diego County. T. L. Lewis, Judge. Affirmed.

The facts are stated in the opinion of the court.

Shreve & Shreve and Geo. H. Shreve for Appellant.

U. S. Webb, Attorney-General, Arthur Keetch, Deputy Attorney-General, and Thomas A. Wood for Respondent.

SLOANE, J.—The defendant and appellant was convicted before a jury in the superior court of the county of San Diego of murder in the first degree.

The circumstances leading up to the tragedy were substantially as follows: The defendant and his wife, on the morning of May 17, 1919, were in the kitchen of their house on the outskirts of the village of La Mesa. Just across the street lived a family by the name of Parks. One Miller, the brother of Mrs. Parks, on the occasion in question, fired his shotgun at a rabbit in the distance. The defendant and his wife, startled by the shot, and appearing to think the shot was aimed in their direction, ran out of the house and, approaching Miller, who had fired from the Parks' grounds, accused him of shooting in the direction of and into defendant's house. The parties thereupon engaged in an altercation over the matter, Miller disclaiming shooting in the direction of the house. Different members of the Parks family came upon the scene, and the testimony is to the effect that defendant became much excited and very abusive. During the altercation the decedent, Fay, who was a special deputy sheriff, came upon the scene of action. He announced that he was an officer. The defendant demanded the arrest of Miller for unlawful shooting. Miller then explained that he had been shooting at a rabbit, and pointed out to Fay the place from which he shot, the location of the rabbit, and the direction of the shots. Miller's statement, according to the testimony of the People's witnesses, greatly angered defendant, and he applied a number of very offensive, vulgar, and opprobrious epithets to Miller and other members of the Parks family, in the presence and hearing of Fay and the women and children of the Parks family. The language and conduct, as testified to on the part of the People, clearly constituted a breach of the peace.

Fay then ordered Gilman from the premises, and apparently took him into custody, leading him away toward defendant's own home. On approaching the house, defendant went in advance of Fay and defendant's wife, who had accompanied them back from the scene of the altercation, and entered the house, while Fay remained on the porch or just in front of the steps on the outside. In a very short time defendant reappeared with a revolver in his hand and immediately opened fire upon Fay, shooting him twice and killing him instantly. He then, without stopping, hurried across the street toward the Parks' home, where Mrs. Parks and her mother and the children were standing outside. He fired the pistol, and the women and children ran. He overtook Mrs. Parks, tried to shoot her, but she diverted the shot by grasping his arm. He then threw her to the ground and beat her over the head with the pistol. She was rescued by Miller, her brother, who sprang upon the defendant from a window, held him down upon the ground and beat him into submission; and he was then again taken into custody.

Subject to two assignments of error presented on this appeal, there is no question that the conviction of the defendant for murder in the first degree was amply justified under the law and evidence of the case. [1] One of the grounds of error relied on is the admission in evidence, over the objection of defendant's counsel, of the testimony regarding the assault upon Mrs. Parks by the defendant immediately after the killing of Fay. It is claimed that this was a subsequent and independent offense, not a part of the *res gestae*, and the testimony thereof extremely prejudicial to defendant.

The general rule that evidence of another offense cannot be introduced for the purpose of indicating a likelihood that the defendant is guilty of the crime charged is undisputed. The exception to the rule, as pointed out in *People v. Edwards*, 13 Cal. App. 551, [110 Pac. 342] is where the evidence of other acts is so connected with the original transaction as to be part of the *res gestae* or to show the motive and intent of the act charged. In this case the only justification suggested for the shooting of Fay was that it was done in resisting an illegal arrest. We think the fact that the defendant, without a moment's hesitation or delay, rushed from the scene of the first shooting, in an attempt upon the lives of members of the Parks family, was compe-

tent evidence tending to show that the motive which impelled him in both instances was anger and resentment growing out of the previous quarrel and altercation in which they all had participated; and that it was not in resistance to an arrest, but in resentment at the part that the deceased and the members of the Parks family had taken against him, that he entered upon his murderous purpose. The facts in *People v. O'Bryan*, 165 Cal. 59, [130 Pac. 1044], present a closely analogous case, where the court says: "There was no error in permitting the people to prove the assault upon Molina, following the firing of the shot that killed Avila. The general rule is, of course, that evidence of other offenses other than the one for which the defendant is on trial is not admissible. But where the two offenses are part of a single transaction, 'every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him.' (*People v. Manasse*, 153 Cal. 10, [94 Pac. 92]; *People v. Walters*, 98 Cal. 141, [32 Pac. 864]; *People v. Craig*, 111 Cal. 468, [44 Pac. 186]; *People v. Teixeira*, 123 Cal. 298, [55 Pac. 988]; *People v. Suesser*, 142 Cal. 363, [75 Pac. 1093].) It was the theory of the prosecution—and the theory was entirely reasonable under the evidence—that the shooting of Avila and the assault on Molina were parts of one attack upon the two, perpetrated in pursuance of a single scheme to terrorize or injure them because they were working for the Llewellyn Iron Works. Whatever was done in the course of that attack was proper as throwing light on the motive and intent of O'Bryan and his companions."

The other exception taken by appellant is to the ruling of the trial court in refusing an instruction in behalf of defendant to the effect that where the evidence shows that a homicide is committed in resisting an unlawful arrest, the ground of conviction is limited to manslaughter.

Defendant, corroborated to some extent by the testimony of his wife, denied that he was guilty of any tumultuous or offensive conduct, or used any vulgar, profane, or indecent language in the presence of Fay and the other persons present at the time of the arrest. As Fay was only a special officer, he was without official authority to make arrest without a warrant, and under the authority of sections 836

and 837 could only have legally arrested defendant for a breach of the peace committed in his immediate presence, either in official capacity or as a private person. While the evidence on this matter is such as to render it extremely unlikely that the jury entertained a reasonable doubt that defendant was disturbing the peace at the time of his arrest, the evidence to the contrary was such as to make the question of an illegal arrest one for their consideration.

[2] It cannot be doubted that the doctrine contended for by appellant, and stated in the opinion of the court in *People v. Dalten*, 21 Cal. App. 770, [132 Pac. 1064], that "where in resistance to an illegal arrest the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter," finds support in a well-recognized line of authority. (*Ross v. State*, 10 Tex. App. 455, [38 Am. Rep. 643]; *Briggs v. Commonwealth*, 82 Va. 564; 1 Wharton's Criminal Law, sec. 136, and citations.) To admit, however, the application of this doctrine there must be evidence not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant. [3] It cannot be admitted that a person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor can respond by shooting to death the officer and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint. (2 R. C. L., p. 474; *Roberson v. State*, 43 Fla. 156, [52 L. R. A. 751, 29 South. 535]; *State v. Meyers*, 57 Or. 50, [33 L. R. A. (N. S.) 143, 110 Pac. 407]; *Porter v. State*, 124 Ga. 297, [2 L. R. A. (N. S.) 730, 52 S. E. 283].)

[4] In this case the arrest was effected by notifying defendant that he was under arrest, and perhaps by the further placing of hands upon him to direct him from the premises. Had he at that time resisted, and, in a struggle to regain his freedom, killed the arresting person, there might be room for the application of the doctrine contended for. But the homicide here occurred some time after the arrest, while the defendant was out of the physical control of the officer. Defendant had gone into his own house, ostensibly to get his coat and hat. Instead of asserting his freedom by refusing to return to the custody of the officer, he armed himself, and, returning to where the officer waited, for the

purpose, as he himself declares, of ordering him from the premises, shot him down, without giving him a chance to leave or waiting for any overt act in attempted furtherance of the alleged illegal arrest. The testimony of the defendant and his wife as to the alleged act of Fay in making a movement and reaching out his arm toward the defendant, who was approaching him with a gun in his hand, presents too trivial a circumstance to in any way justify the shooting. At the time of the homicide the deceased was using no force or show of force toward the defendant. In *People v. Bradley*, 23 Cal. App. 44, [136 Pac. 955], where a special policeman in plain clothes arrested a man on suspicion, without revealing his identity as a peace officer, and the prisoner, while walking with the officer to the jail, suddenly turned into an alley and shot the officer, it is held that the killing was not justifiable, nor was the act reduced from murder to manslaughter. The court says: "We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of a willful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that, therefore, it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter. (*People v. Pool*, 27 Cal. 573; *Keady v. People*, 32 Colo. 57, [66 L. R. A. 353, 74 Pac. 893].)"

The instruction asked by appellant and refused by the court was as follows: "The court instructs you that if you find from the evidence that the decedent, Fay, was attempting to make an unlawful arrest of the person of the defendant, Gilman, and that the killing occurred while the defendant was resisting such unlawful arrest, it will then be

your duty to acquit the defendant of the charge of murder, both of the first and second degree, and consider only the question of whether or not he be guilty of manslaughter." We are satisfied that there was no sufficient evidence before the jury that the shooting was done in resisting an arrest to justify the instruction. Even if technically a proper instruction, the circumstances of the shooting, as shown in evidence, were such as to render it extremely improbable that its absence was in any way prejudicial to the defendant, or at all affected the verdict of the jury; and the error, if there was such, might be disregarded under section 41½ of article VI of the constitution.

Judgment affirmed.

Finlayson, P. J., and Thomas, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred.

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[Civ. No. 2182. Third Appellate District.—April 14, 1920.]

**C. L. SEARCY, Petitioner, v. THE SUPERIOR COURT  
OF HUMBOLDT COUNTY et al., Respondents.**

- [1] **PLACE OF TRIAL—CHANGE—LOSS OF JURISDICTION.**—When the superior court of the county in which an action is pending makes its order transferring the cause to the superior court of another county, it thereby loses, for all purposes, all jurisdiction of the action.
- [2] **ID.—ACTION FOR DIVORCE—CHANGE—APPEAL—POWER TO ORDER ADDITIONAL ALIMONY.**—After the superior court of the county in which an action for divorce is pending makes its order transferring the cause to the superior court of another county, it has no power to order additional alimony and counsel fees, notwithstanding an appeal is taken from the order changing the place of trial.

**APPLICATION for a Writ of Prohibition to restrain the Superior Court of Humboldt County and Denver Sevier,**

Judge, from proceeding in a divorce action after change of venue. Writ granted.

The facts are stated in the opinion of the court.

Henry L. Ford and J. T. Fraser for Petitioner.

E. L. Webber for Respondents.

PREWETT, P. J., *pro tem.*—This is an application for a writ of prohibition to restrain respondents from proceeding further with certain orders and proposed orders in a divorce action wherein one Mary Louise Searcy is the plaintiff and above-named petitioner is defendant. Said superior court on the ninth day of January, 1920, on due proceedings had in that behalf, made and entered its final order changing the place of trial of said action from said county of Humboldt to the city and county of San Francisco. On the same day the petitioner appealed from said order and his appeal is now pending.

Notwithstanding said change of place of trial, said superior court, respondent herein, upon the usual notice and motion, proceeded to make its further order allowing to said plaintiff Mary Louise, certain sums by way of alimony for her support and also as counsel fees on appeal.

The petitioner insists that said orders are in excess of the jurisdiction of the court. Said court is about to take proceedings against petitioner looking to the enforcement of said orders.

[1] (1) When the court made its order transferring the cause to the superior court of the city and county of San Francisco it thereby lost, for all purposes, all jurisdiction of the action. (*Chase v. Superior Court*, 154 Cal. 789, [99 Pac. 355]; *Hatch v. Galvin*, 50 Cal. 441, and *People v. Suesser*, 142 Cal. 354, [75 Pac. 1093].) In the first of these cases the court uses the following language: "We are of the opinion that the action was transferred to Santa Clara County when the order was finally made and entered in the superior court of the city and county of San Francisco. There must be a moment of time when the court transferring the case loses jurisdiction and the court to which it is transferred acquires jurisdiction. When the court to which the

action is transferred acquires jurisdiction, the court which made the order transferring it, has no power to make any further order in the premises." In the Hatch case the court says: "The order thus entered vested the jurisdiction in the court of said Abner C. Squire, and necessarily put an end to the jurisdiction of the defendant over the case." To the same effect are the following cases from other jurisdictions: *State v. Lay*, 128 Mo. 609, [29 S. W. 999]; *Cunningham v. Current, etc.*, 165 Mo. 270, [65 S. W. 556]; and *Fatt v. Fatt*, 78 Wis. 633, [48 N. W. 52].

It is provided in section 399 of the Code of Civil Procedure that: "The court to which the action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein."

Therefore, in the absence of an appeal, there exists no doubt that the respondents lost all jurisdiction and power of every sort in the premises.

[2] (2) It is insisted by the learned judge of the court below that, in the ordinary divorce action, the power of the court to make further allowances pending an appeal is fully recognized, and in support of this position he cites the following cases: *Reilly v. Reilly*, 60 Cal. 626; *Ex parte Winter*, 70 Cal. 292, [11 Pac. 630]; and *Bohnert v. Bohnert*, 91 Cal. 428, [27 Pac. 732]. Without quoting from these cases at length, they may be summed up as holding that the lower court, in case of an appeal, retains sufficient jurisdiction to order further payments of alimony and counsel fees. While the authorities are far from uniform in other states, this doctrine in this state is too well settled to be open to question. This principle does not, however, obtain in a case wherein the place of trial has been changed. It is not to be doubted that *some* court has or retains the power to order additional alimony and counsel fees, but not the court from which the venue has been changed.

In the ordinary case, the entire jurisdiction in case of an appeal, remains apportioned between the trial court and the appellate court. In the absence of a stay of proceedings all the powers which do not pass to the appellate court as appertaining to the disposition of the case on appeal remain with the lower court and may be exercised by it. One of these powers is the right to award additional alimony and counsel fees.



But in the case now under examination the court made its unconditional order changing the place of trial. This order, as we have seen, operated, *eo instanti*, to change the jurisdiction to the new court. There is no provision for a stay of proceedings in case of a change of place of trial. Section 949 of the Code of Civil Procedure, so far as pertinent, reads as follows: "and except, also, where the order grants or refuses to grant a change of place of trial of the action."

An interval of time ensued between the making of the order changing the place of trial and the taking of the appeal. And hereat is found the crux of the whole matter. During this interval it is manifest that the *only* court having any powers in the premises was the San Francisco court. It could during that interval have granted additional allowances and have proceeded in every way with the trial or other disposition of the case. The appeal which was subsequently taken did not reinvest the Humboldt court with any of the powers which had already passed to the new court. A part of the order complained of provides for alimony for the support of the wife. In every view of the matter the San Francisco court, by the order of transfer, acquired jurisdiction to make or modify similar orders. Such co-ordinate and co-equal jurisdiction cannot have existed at the same moment of time in each of the two courts.

The conclusion of the court is that the order of transfer vested the entire jurisdiction in the San Francisco court and that this order became operative immediately upon its entry. All subsequent proceedings in the Humboldt court are null and void.

Let a writ of prohibition issue as prayed for.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 10, 1920.

All the Justices concurred.

[Crim. No. 699. Second Appellate District, Division Two.—April 14, 1920.]

THE PEOPLE, on Behalf of GUADALUPE and ELVIRA GUTIERREZ, Alleged Wards, etc., Respondent; TOMAS GUTIERREZ, Appellant.

[1] **PARENT AND CHILD—CAPABILITY OF FATHER TO EXERCISE PROPER CONTROL—EVIDENCE—FINDING.**—On this proceeding to secure an order of the superior court, sitting as a juvenile court, declaring certain minors to be wards of said court, and taking them from the custody and control of their father, although the evidence showed that the grandmother of the children was so situated as to give them better attention and more wholesome surroundings than they were likely to receive under the arrangements made by the father for their care and custody, there was no evidence to support the finding of the court that they had no parent or guardian capable of exercising proper parental control. It is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child.

**APPEAL** from an order of the Superior Court of San Diego County declaring certain minors to be wards of said court. S. M. Marsh, Judge. **Reversed.**

The facts are stated in the opinion of the court.

E. F. Du Fresne for Appellant.

U. S. Webb, Attorney-General, Arthur Keetch, Deputy Attorney-General, and Thomas A. Wood for Respondent.

**SLOANE, J.**—This is an appeal from an order of the superior court of the county of San Diego, sitting as a juvenile court, declaring Guadalupe and Elvira Gutierrez, minors, to be wards of said court, and taking them from the custody and control of their father, Tomas Gutierrez, appellant herein.

[1] The only averment upon which jurisdiction could be maintained to declare these minors wards of the court is

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1. Father's right to custody of child, notes, 34 *Am. Rep.* 698; 40 *Am. Rep.* 327.

contained in the following allegation of the petition: "That said Guadalupe and Elvira Gutierrez have no parent or guardian capable of exercising proper parental control." The court, in its order committing the minors to the care of their grandmother, under the custody of the probation officer, finds that all of the allegations of the petition are true. In the hearing on writ of *habeas corpus* in this same matter, we held that this finding was sufficient to sustain the order. On this appeal the issue is presented on the sufficiency of the evidence to support this finding. We think the evidence is insufficient.

It was shown by the testimony, without dispute, that at the time of commencing this proceeding the minors, who are girls aged respectively one and three years, were in the custody of their father. The mother is dead, and the children had for some time been in the immediate care of the maternal grandmother, with the father's consent, and under an arrangement whereby he paid for their keep. Some two or three months prior to this proceeding the father took them from the grandmother, owing to some personal differences which had arisen between the two. He at first kept them at his home, with the help of a woman he employed, but later sent for and paid the transportation of a brother and his family, who lived in New Mexico, to come to San Diego and live with him and make a home for himself and the children. They were all living together under this arrangement when this proceeding was commenced. It is undisputed that the father is an industrious man, earning good wages, affectionate with the children, spending his money freely to provide for them, and able and willing to care for them. There is nothing to indicate that the care and custody given these minors by their father is not as good as ordinarily falls to the lot of families in the same station in life. There was some evidence tending to show that the children were well and affectionately cared for by the grandmother, and that she was so situated as to give them better attention and more wholesome surroundings than they were likely to receive under the arrangements made by the father. It is quite evident from the remarks of the trial judge, shown in the transcript of the proceedings, that it was this circumstance that influenced his decision to take the children from the father and place them

in the custody of the probation officer under the immediate care of the grandmother. But there is neither any allegation in the petition nor finding in the order of commitment to justify depriving the father of the custody of his children on the ground that their welfare demanded that the father be deprived of their custody. Section 9b of the juvenile court law provides that "no ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of a crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian." The findings thus required are necessary to support the order of commitment, and must regularly appear of record. (*In re Brodie*, 33 Cal. App. 751, 753, [166 Pac. 605].) As has already been pointed out, the only finding in this matter is that the minors "have no parent or guardian capable of exercising, proper parental control"; and we have held that this finding is not supported by the evidence.

Moreover, we question if the evidence presented in the record is sufficient to justify a finding that the welfare of the minors requires that their custody be taken from the father, if such an allegation had appeared in the petition, or such finding had been made. The juvenile court law certainly does not contemplate the taking of children from their parents and breaking up family ties merely because, in the estimation of probation officers and courts, the children can be better provided for and more wisely trained as wards of the state. Probably from mere considerations of healthful and hygienic living and systematic education and training this would be true in the cases of thousands of families of wealth and respectability. We think it is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child.

Notwithstanding we are fully satisfied that the juvenile court was actuated by its desire that these children should have a better home than the father was likely to provide, we are convinced that neither the law nor the facts in the case justified the order appealed from.

The order is reversed.

Finlayson, P. J., and Thomas, J., concurred.

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[Civ. No. 3163. Second Appellate District, Division Two.—April 14, 1920.]

AMERICAN BOND & MORTGAGE COMPANY (a Corporation), Respondent, v. L. LINDSAY, Appellant.

[1] CORPORATIONS—ACTION TO CANCEL VOID ISSUE OF STOCK—PLEADING—PARTIES—TRANSFEREE WITH NOTICE.—In an action by a corporation to cancel an issue of certain shares of its treasury stock which had been issued in direct contravention of a permit that had been granted by the commissioner of corporations, an individual to whom a part of such stock was issued is neither a necessary nor a proper party defendant where, prior to the commencement of such action, such stock was transferred to another who took with full knowledge of all the facts affecting the validity of its issue; and a motion for a nonsuit as to him should be granted.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Wellborn, Judge. Reversed.

The facts are stated in the opinion of the court.

A. L. Abrahams for Appellant.

Clark & Pierson and Dennis & Loewenthal for Respondent.

FINLAYSON, P. J.—This is an action by a California corporation to cancel an issue of certain of its shares of treasury stock—shares that it had issued to the four defendants, Lindsay, Corbaley, Maescher, and McKinney, in exchange for certain shares that they owned of the capital stock of the State Investment Company. The theory of

the complaint is that the issue of plaintiff's stock in exchange for stock of the State Investment Company was in direct contravention of a permit that had been granted by the commissioner of corporations, and that, therefore, under the provisions of the Investment Companies Act, commonly known as the blue sky law (Stats. 1913, p. 715), the issue was a nullity. The appeal is by the defendant Lindsay.

The case, as presented by the complaint and found by the court, is substantially as follows: At a time when plaintiff's board of directors was dominated and controlled by one Pearson, the latter, for his own illegal profit and gain, caused 57,226 shares of plaintiff's treasury stock to be issued to the four above-named defendants in exchange for 71,532 shares of the capital stock of the State Investment Company that theretofore had been issued to and were then owned by these four defendants. Of the 57,226 shares of plaintiff's treasury stock so issued, 19,944 were issued to defendant Lindsay. Previous to the issue of the 57,226 shares, and pursuant to the act commonly known as the blue sky law, plaintiff, whose capital stock was divided into two million shares of the par value of one dollar each, had made application to the commissioner of corporations for authority to sell its corporate stock. A temporary permit was issued by that officer whereby plaintiff was authorized to issue not exceeding one million of its shares "in exchange for property, the fair and reasonable net market value of which . . . shall . . . equal or exceed 110 per cent of the par value of the shares issued therefor." It is alleged in the complaint and found by the court, in substance and effect, that the value of the State Investment Company's shares that the four defendants transferred to plaintiff in exchange for its 57,226 shares of treasury stock, did not exceed sixty-three per cent of the par value of plaintiff's capital stock. Wherefore plaintiff, which, since the exchange, has come under the control of a board of directors by whom the whole transaction has been repudiated, seeks to rescind the exchange and to cancel the issue of its treasury stock as a void issue under the blue sky law, section 5 of which reads: "It shall be unlawful to issue any security to which this act is applicable unless a certificate or a temporary permit authorizing the issue thereof shall first have been received from the commissioner of corporations as provided in this act."

[1] The complaint alleges and the court finds that, before the action was commenced, the 19,944 shares of plaintiff's treasury stock that it had issued to Lindsay in exchange for shares of the State Investment Company had been transferred by Lindsay to John R. Gardiner, who, though made a party defendant, was not served with summons and did not appear in the action. It further is found by the court that, at all times since the transfer to Gardiner, the 19,944 shares have stood in his name on plaintiff's books. The complaint also alleges that Gardiner acquired the stock from Lindsay with full knowledge of all the facts affecting the validity of its issue. Plaintiff's evidence showed, without conflict, that, when the action was commenced, Lindsay had no interest whatever in the stock, he having theretofore transferred all his interest therein to Gardiner, as we have stated. For this reason Lindsay moved for a nonsuit. The motion was denied.

After finding the facts substantially as we have stated them, judgment was entered against the four defendants Lindsay, Corbaley, Maescher, and McKinney, whereby the court, in substance, decreed: (1) That the issue of the shares of plaintiff's treasury stock, which, of course, included the 19,944 that had been issued to Lindsay and by him transferred to Gardiner, was and is void; (2) that plaintiff cancel said issue on its records; (3) that defendant Lindsay, as well as his codefendants Corbaley, Maescher, and McKinney, deliver to plaintiff the certificate or certificates evidencing the issuance of the 57,226 shares—and this notwithstanding Lindsay had transferred his shares to Gardiner, in whose name the stock then stood of record on plaintiff's books; and (4) that plaintiff recover its costs. From that judgment Lindsay has taken this appeal.

The appeal presents a number of interesting questions arising under the blue sky law, which, however, it will not be necessary to consider, since appellant was neither a necessary nor a proper party defendant, and for that reason alone the court should have adjudged that plaintiff take nothing as against Lindsay and that he recover of plaintiff his costs.

The stock certificate that evidenced the issue of the 19,944 shares to Lindsay was not a negotiable instrument; and, moreover, Gardiner, according to plaintiff's complaint, took the shares, as the transferee of Lindsay, with full knowl-

edge of all the facts affecting the validity of the issue. Gardiner, therefore, cannot possibly have any cause of action against Lindsay for damages, or for reimbursement, based on the fact, if it be a fact, that Lindsay never acquired title to the stock. Gardiner's knowledge of the facts precludes any possible claim that his vendor, Lindsay, impliedly warranted the title. (35 Cyc. 386; *Dreisbach v. Eckelkamp*, 82 N. J. L. 726, [83 Atl. 175]; *Libby v. Pelham*, 30 Idaho, 614, [166 Pac. 575], concurring opinion of Justice Morgan.) Appellant's presence, therefore, as a party defendant, was not necessary to a determination of any controversy there might be between Gardiner and himself. There was no basis for any controversy between them.

So far as the relief sought by plaintiff is concerned, appellant was neither a necessary nor a proper party defendant. Plaintiff asked that the issue of the stock be canceled. For that purpose (in so far as the shares issued to Lindsay are concerned) it was necessary to have Gardiner only before the court. Plaintiff and Gardiner are the only parties interested in those shares. Appellant had no possible interest in the controversy; there was nothing that he could do, or be compelled to do, that could effect a cancellation of the invalid issue of plaintiff's treasury stock; and his presence as a party defendant was, therefore, neither necessary nor proper. (*Topping v. Van Pelt*, Hoff. Ch. (N. Y.) 545; *Wright v. Day*, 59 Misc. Rep. 76, [111 N. Y. Supp. 1105]; *Fairgate Realty Co. v. Drozda* (Mo.), 181 S. W. 398; *Campodonico v. Grossini*, 66 Cal. 358, [5 Pac. 609].) For this reason, appellant's motion for a nonsuit should have been granted. However, it will not be necessary to remand the case for a new trial, since the findings themselves, because they disclose that Lindsay had transferred all of his shares to Gardiner, show that it was error to render judgment against appellant. And that error, at least in so far as the judgment adjudges appellant liable for costs, is prejudicial.

The judgment is reversed as to the defendant Lindsay, and the cause remanded that the judgment may be modified in accordance with what is here said.

Sloane, J., and Thomas, J., concurred.



[Civ. No. 2083. Third Appellate District.—April 15, 1920.]

C. COHN, Respondent, v. C. M. THOMPSON et al., as Co-partners, etc., Appellants.

[1] **STREET LAW—BONDS—TERM—OMISSION TO DESIGNATE—CURE OF DEFECT.**—Where the resolution of intention, in connection with proceedings for certain street work instituted and carried through under the provisions of the Vrooman Act and the Bond Act of 1893, provides that serial bonds shall issue to represent the cost and expense of the work, but the city council does not designate the period of time over which the bonds shall extend, and no objection in writing or appeal is filed, either from or concerning the assessment which is issued or the action of the superintendent of streets in designating in the warrant attached to the assessment the period of time over which the bonds shall extend, or otherwise, and bonds are accordingly issued, the defect, if not waived by the failure to appeal from the action of the superintendent of streets in fixing in the warrant the period of time over which the bonds should extend, is, under section 4 of the Bond Act, cured by the issuance of the bonds.

**APPEAL** from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge. Reversed.

The facts are stated in the opinion of the court.

Arthur M. Ellis and Everts & Ewing for Appellants.

Matthew S. Platz and C. E. Arnold for Respondent.

**BURNETT, J.**—The appeal is on the judgment-roll, and the contention of appellants is that, upon the findings, the judgment should have been in their favor. It appears that proceedings for certain street work in the city of Bakersfield were instituted and carried through under the provisions of the Vrooman Act, [Stats. 1885, p. 147], and the Bond Act of 1893, [Stats. 1893, p. 33]. All the proceedings were entirely regular, except that the city council did not definitely designate the period of time over which the bonds should extend, the declaration of intention simply stating as to this that "said serial bonds shall extend over a period not to exceed five years from their date." After the completion of the work the superintendent of streets made out

an assessment, diagram, and warrant covering the expenses of the work and recorded them in his office. The warrant contained the following: "Serial bonds bearing interest at the rate of eight per cent per annum and extending over a period of time ending four years from and after the second day of January next succeeding their date are to be issued to represent the cost and expense of the work described in the assessment," etc.

No person filed with the city clerk any objection in writing or appealed to the said board from or concerning said assessment or any act or determination of the superintendent of streets concerning said assessment or otherwise. After the expiration of thirty days from the recording of the assessment, diagram, warrant, and return of the superintendent of streets, he made out and certified to the city treasurer a complete list of the unpaid assessments, and thereupon the treasurer made out, signed, and issued to Thompson Bros., the contractors named in said warrant, bonds in proper form for said assessment on each lot of land designated. These bonds were issued August 23, 1912. The complaint herein was filed a few days later. A general demurrer to the complaint was sustained January 18, 1913, and an amended and supplemental complaint, bringing in new parties plaintiff and defendant, on account of the conveyance and transfer of the land and of the bonds, was filed March 13, 1916, more than three years after said demurrer was sustained. A general demurrer to the amended complaint was overruled. The defendants answered and, upon a stipulation of the facts, the trial court concluded that the assessment was legal and valid, but that the warrant and the bonds were illegal and void for the reason that the city council never at any time fixed the term of the bonds. This view of the court that the bonds were invalid involves the only question on this appeal.

Two points are made by appellants: "1. The failure of any person to appeal from the action of the superintendent of streets in fixing in the warrant the period of time over which the bonds should extend constituted a waiver of the objection. 2. It being found that the assessment itself is valid and that it still constitutes a lien, the irregularity with respect to the warrant was cured by the issuance of the bonds."

[1] It is conceded that it was the statutory duty of the board of trustees to fix the period over which the bonds should extend, and that the superintendent of streets had no such authority. But it appears by the decision in *Cohn v. Federal Construction Co.*, 171 Cal. 547, [153 Pac. 916], which involved a similar resolution by the board of trustees of Bakersfield, that said board had authority at any time to fix said period definitely and that thereafter another warrant and bond of binding force and effect could be issued. Hence it is strongly insisted by appellants that the case falls clearly within the doctrine of *Chase v. Trout*, 146 Cal. 350, [80 Pac. 81], stated as follows: "By a long line of decisions it has become the settled doctrine that, with respect to any material defect or irregularity which could be cured by the council, the remedy by appeal is the only remedy; so that if the party does not appeal he waives the objection, and if he does appeal the judgment of the council is conclusive." Herein, the defect was material, it could have been corrected by the trustees, and no doubt would have been if application had been made, but the property owner chose to sit idly by and decline to avail himself of the very remedy that has been provided to prevent such expensive and protracted litigation as this.

But if the defect herein be considered too serious for the application of said principle, then, as we understand the decisions of the supreme court, it must be held that the situation is relieved by the operation of the curative provision of said bond act. Section 4 thereof (Stats. 1911, p. 1201) provides: "Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent to the city treasurer, and of the validity of said lien up to the date of said list."

The effect to be given to such curative measures is very fully considered in *Chase v. Trout*, *supra*, and little more can be said. Therein it is stated: "The correct proposition is, that as the legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be suffi-

cient to constitute the due process of law required by the constitution, and otherwise complies with constitutional limitations and restrictions, so the legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond, or the execution of a deed, in the enforcement of such levy or assessment, shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax and that no inquiry may be made concerning them. This is substantially the effect of the statute in question here. The conclusive evidence clause of section 4 of the Bond Act is a part of the law under which the proceeding was carried on, and its effect is the same as if it declared that, although all of these intermediate steps are directed, yet, if they are not performed as required, and the owner permits the matter to proceed until the bond is issued, he shall be thenceforth precluded from proof of such nonobservance, and the requirements shall be conclusively presumed to have been complied with, excepting those which are necessary to comply with constitutional mandates."

The court proceeds to state with more particularity the essentials the nonobservance of which cannot be cured, but it is manifest that there has been herein no violation of any constitutional right, nor can it be said that the owner has not had the notice which constitutes due process of law. The defect herein had merely to do, as appellant suggests, "with the technical details of the process whereby the plaintiff was extended a substantial period of credit before meeting the obligation of an assessment regularly levied." Not one of his fundamental rights was violated or infringed, and it seems strange that he should attempt, upon the basis of an irregularity which has caused him no prejudice, to defeat these important memorials of a valid indebtedness held by purchasers for value, who had a right to rely upon said rule of the statute.

The most recent consideration of the question by the supreme court is found in *Watkinson v. Vaughn*, 182 Cal. 55,

[186 Pac. 753], wherein it is held that "In the matter of street improvement proceedings under 'The Improvement Act of 1911,' [Stats. 1911, p. 730] the failure of the resolution of intention to expressly declare, as required by section 4 of the act, that the district described and to be assessed is the district to be benefited by the work of improvement, is cured by the failure of the property owners, as provided by section 16 of the act, to make objection to such omission, and by the issuance, without objection, of bonds to pay for the improvement, which bonds, by section 66 of the act, by their issuance, are made conclusive evidence of the regularity of the proceedings." Assuredly, the defect in that case was as serious as in this, and we feel no doubt that under the authorities and upon principle the respondent should not be permitted at this late date to question the validity of said bonds.

We think the judgment should be reversed as far as said bonds are concerned and a judgment upon the findings be rendered declaring said bonds to be valid and legal and for appellants' costs.

It is so ordered.

Ellison, P. J., *pro tem.*, and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1920.

All the Justices concurred.

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[Civ. No. 3186. Second Appellate District, Division Two.—April 16, 1920.]

C. R. BAYLESS, Appellant, v. J. F. REED et al., Executors, etc., Respondents.

- [1] EVIDENCE—SERVICES RENDERED BY WIFE TO DECEASED—ACTION BY HUSBAND TO RECOVER COMPENSATION—COMPETENCY OF WIFE AS WITNESS.—In an action by a husband against the executors of an estate to recover compensation for services rendered the deceased by plaintiff's wife, the latter is not disqualified from being a witness for the plaintiff by the provisions of subdivision 3 of

section 1880 of the Code of Civil Procedure. It is not intended by that section to extend the disqualification to any except parties or assignors of parties.

APPEAL from a judgment of the Superior Court of San Diego County. S. M. Marsh, Judge. Reversed.

The facts are stated in the opinion of the court.

H. W. Scheld for Appellant.

Ward, Ward & Ward for Respondents.

THOMAS, J.—By this action plaintiff seeks to recover \$2,354.92 from the defendants, executors of the estate of Edwin Ferris, deceased, for work, labor, and services performed and supplies furnished to said Ferris, at his special instance.

The answer of defendants to plaintiff's third amended complaint, after admitting formal parts only, denied each and every material allegation thereof, and set up an alleged agreement under and by virtue of which plaintiff performed the work and furnished the materials, etc., for which he now seeks pay, asserting that said decedent, Ferris, had paid plaintiff in full for all said service. We think it unnecessary to recite in detail the terms of this alleged agreement. The case was tried by the court without a jury. Findings were expressly waived. Judgment went for plaintiff in the sum of \$102.92. There was no motion for a new trial. The appeal is from the judgment, by the so-called "alternative method."

We have read the entire record, consisting, as it does, of the clerk's transcript and reporter's transcript, also appellant's opening brief and respondents' answering brief, from which it appears that both parties hereto seek a reversal of the judgment.

Appellant in his brief says: "Under section 41½ of the constitution of the state of California, and when it appears from the whole of the record in a case on appeal that substantial justice should be done, the appellant asks this appellate court, without having to undergo the expense and necessity of another trial herein, that this court find for plaintiff the amount which is justly due him in this case."

Much as we might desire to comply with the foregoing interesting request, the answer is that the court is without jurisdiction to grant it. (Sec. 4, art. VI, Const.) [1] A large portion of the amount claimed by plaintiff as aforesaid was for the services of his wife as nurse for deceased at the latter's special instance and request, and in order to prove the allegations of his complaint as to such services, plaintiff offered his wife, Minnie E. Bayless, as a witness in his behalf, whose testimony, if received, would have tended to show such allegations to be true. To the testimony of this witness the following objection was interposed: "We object to this witness testifying as to the transactions had with the decedent on the same ground, that of section—subdivision 3 of section 1880 of the Code of Civil Procedure. This witness is not, of course, the nominal party, but the section is broader than to exclude nominal parties—it excludes not only parties or assignors of parties, it also includes—excludes persons in whose behalf the action is prosecuted. Now, of course the testimony has not progressed far enough to show, but the pleadings indicate so clearly the nature of the claim being presented against this estate, it is for services rendered, a larger part is a claim for services of this witness, as a member of the community of which she and the plaintiff are members, and by the same reasoning and on the same theory the testimony of this witness is also incompetent." This objection was at first overruled, but later, and after the witness had testified fully, the ruling, so far as it relates to that portion of the witness' testimony in reference to plaintiff's claim for her services as nurse, was set aside, and the objection thereupon sustained. It is claimed by appellant that this ruling was erroneous, and we think the contention must be sustained.

That the earnings of the wife in such a case as this are community property is too well settled to require the citation of authorities. Such being the case, we think that where a husband is suing for services rendered by his wife, his claim is not derived from her, since he is entitled to the value of her services by virtue of his marital rights, and she, therefore, is a competent witness for him. (40 Cyc. 2295; *Porter v. Dunn*, 131 N. Y. 314, [30 N. E. 122]; *Hopkins v. Clark*, 90 Hun. 4, [35 N. Y. Supp. 360]; *Hiskett v. Bozarth*, 75 Neb. 70, [105 N. W. 990]; *Parker v. Wells*,

68 Neb. 647, [94 N. W. 717]; *Miller v. Miller*, 7 Ariz. 316, [64 Pac. 415]; *Cullen v. Bisbee*, 168 Cal. 695, [144 Pac. 968].) Nor do we think that it is intended by this section to extend the disqualification to any except parties or assignors of parties. (*Todd v. Martin*, 4 Cal. Unrep. 805, [37 Pac. 872].)

If it be contended in this case that should plaintiff recover, the wife would by that fact be interested in the result because of the fruits of such recovery being community property, the answer, as we see it, is that in legal contemplation she would not be invested with any legal interest therein. In the case of *Lucas v. McDonald*, 126 Iowa, 678, [102 N. W. 532], the supreme court of Iowa held that while the statute provided that "no party to an action, or the wife of such party, shall be examined as a witness in regard to any personal transaction between such witness and a person since deceased, as against the administrator of such deceased person," still, it not appearing that the wife had any part therein, in such a case she was a competent witness. Such cases as we have found holding to the contrary are predicated upon statutes differing in various respects from ours.

For these reasons we think the ruling referred to was prejudicial.

Judgment reversed.

Finlayson, P. J., and Sloane, J., concurred.

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[Civ. No. 2830. Second Appellate District, Division One.—April 17, 1920.]

CHARLES E. SUMNER, Respondent, v. GEORGE F. MOHN, Appellant.

- [1] HUSBAND AND WIFE—MARITAL DIFFERENCES—EMPLOYMENT OF ATTORNEY BY WIFE—AGENCY.—Statements by the husband to the wife that "we had better settle up and separate" and "you go ahead and get your counsel and I will get mine," made because of existing marital differences, but not communicated to the attorney from whom the wife thereupon sought advice as to such marital differences and who subsequently brought an action against the husband for separate maintenance, cannot be construed as creating an agency in the wife with power to make a contract



in the name of the husband and binding him to pay for such services rendered to her alone and against him as principal.

- [2] **ID.—SUIT FOR SEPARATE MAINTENANCE—LEGAL SERVICES RENDERED WIFE—NECESSARIES—LIABILITY OF HUSBAND.**—Legal services rendered to the wife in connection with the bringing of a suit against the husband for separate maintenance does not constitute necessities, for which the husband is liable under section 174 of the Civil Code.
- [3] **ID.—RIGHTS OF WIFE—HOW PROTECTED—IMPLIED POWER TO PLEDGE HUSBAND'S CREDIT.**—Section 137 of the Civil Code guarantees the wife full and complete relief and provides the means necessary for securing her rights in the prosecution of a suit for separate maintenance, and, in the absence of necessity for pledging the husband's credit, no implied power to do so exists.
- [4] **ID.—POWER OF WIFE TO CONTRACT FOR LEGAL SERVICES—RIGHT OF ATTORNEY TO RECOVER FROM HUSBAND.**—A wife has no implied power to make a contract for legal services to be rendered for her sole benefit in matters adverse to the husband; and the attorney rendering such services at her request cannot recover therefor in an independent action against the husband.

**APPEAL** from a judgment of the Superior Court of San Diego County. S. M. Marsh, Judge. Reversed.

The facts are stated in the opinion of the court.

Adam Thompson, Iverson L. Harris and Patterson Sprigg for Appellant.

Wright & McKee for Respondent.

**SHAW, J.**—In this action plaintiff sued for the reasonable value of legal services alleged to have been performed for defendant at his special instance and request.

The case was tried by a jury, which gave a verdict in favor of plaintiff for eleven hundred dollars. Judgment followed accordingly, from which defendant appeals, presenting in lieu of a bill of exceptions a typewritten record as provided in section 953a of the Code of Civil Procedure; and in their briefs the parties have printed portions of the record upon which they rely in support of their respective contentions. Though nothing appears in the complaint or bill of particulars rendered by plaintiffs on demand of defendant to indicate such fact, it nevertheless

appears from the evidence received that plaintiff's claim for compensation is based upon services not in fact rendered to or performed for defendant, but for the latter's wife, who, as claimed by plaintiff, was agent of the husband, and being thereunto, at the expense of defendant, expressly authorized so to do, employed plaintiff as her attorney, from whom she sought advice as to marital differences existing between herself and husband, as a result of which, after some eighty or ninety separate consultations, covering a period of three or four months, plaintiff for the wife brought an action against defendant for separate maintenance.

The existing agency and the fact that the wife of defendant was by him expressly authorized to employ plaintiff as an attorney, and thus obligate him to pay for the services rendered his wife, depends solely and alone upon the latter's testimony, who, notwithstanding the provisions of section 1881 of the Code of Civil Procedure, was permitted to testify against her husband without objection interposed by defendant, who now for the first time claims that it was error. [1] Without considering the point, we may say that her testimony is insufficient to justify the finding implied by the verdict that she was authorized to act for defendant in employing plaintiff as her attorney at the expense of her husband in matters adverse to him and for the purpose of instituting an action against him. Her testimony, after stating at great length the existing marital differences and causes thereof, is that on the evening of October 11, 1917, "Doctor Mohn [the defendant] said to me, 'Well, we had better settle up and separate'; he said, 'You go ahead and get your counsel and I will get mine.'" And again, "on the afternoon of October 15th, Doctor Mohn told me to go ahead and get an attorney, and we would settle this thing up." This testimony and this alone, *not, however, communicated to the plaintiff*, constitutes the only evidence in support of plaintiff's claim that, in employing him as an attorney against defendant, his client acted merely as agent of the defendant, who was obligated to pay for the services so adversely rendered. Conceding the statements, the making of which defendant denies, were in fact made, they could not under the circumstances have been reasonably understood by Mrs. Mohn or intended by defendant to have

been made with the intent and purpose of conferring authority upon the wife as agent of her husband to obligate him upon the alleged contract. Suppose in a dispute over a boundary line between A and B, the former should say to the latter, "You go ahead and get your attorney and I will get mine and we will settle this matter," manifestly B's attorney could not recover from A for services rendered B upon the theory, based upon the language used, that in employing him B was acting as the agent of A, having authority to engage counsel for himself at A's expense. This being true, it follows that, since, as to existing differences between the husband and wife, their relation was that of strangers, what was said by Dr. Mohn cannot be construed as creating an agency in the wife with power to make a contract in his name and binding him to pay for services rendered to her alone and against the husband as principal.

[2] Conceding the evidence insufficient to show express authority conferred upon defendant's wife to make the alleged contract, plaintiff nevertheless insists that the services rendered must be deemed necessities furnished her; and hence, under the provisions of section 174 of the Civil Code, the husband is, regardless of the question of express agency, liable for the value thereof. The section provides that in case the husband "neglect to make adequate provision for the support of his wife, . . . any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." The services rendered, according to respondent, "were for investigation, consultation, preparation, and the beginning of a suit for separate maintenance, and covered a period extending from October 12, 1917, to April 3, 1918." While cases may be found tending to support respondent's contention, the overwhelming weight of authority is to the contrary. The statutory liability of the husband is for articles necessary for the wife's support. In our opinion, legal services cannot be deemed such articles. The common law defines necessities to consist only of necessary food, drink, clothing, washing, physic, instruction, and a convenient place of residence. (2 Kent's Commentaries, 124; *Shelton v. Pendleton*, 18 Conn. 417; *Coffin v. Dunham*, 8 Cush. (Mass.) 404, [54 Am. Dec. 769]; *Clarke v. Burke*,

65 Wis. 359, [56 Am. Rep. 631, 27 N. W. 22], and cases referred to in note in L. R. A. 1915C, p. 467.)

[3] Moreover, the services rendered pertain to the bringing of a suit for separate maintenance, and the statute (sec. 137, Civ. Code) provides that the court may require the husband to pay such money as may be necessary for the prosecution of the action. This statute guarantees the wife full and complete relief and provides the means necessary for securing her rights, and, hence, in the absence of necessity for pledging the husband's credit, no implied power to do so exists. (*Meaher v. Mitchell*, 112 Me. 416, [Ann. Cas. 1917A, 688, L. R. A. 1915C, 467, 92 Atl. 492].) In the action for separate maintenance the court had before it the parties, their property, their merits and delinquencies, and was thus, as intended by the statute, not only in a position to fix the compensation of plaintiff for the services rendered to the wife, but presumably did require the husband to pay such sum as it deemed just and equitable therefor. [4] In view of the code provisions of this state, a wife has no implied power to make a contract for legal services to be rendered for her sole benefit in matters adverse to the husband. Hence, it follows that the attorney rendering such service at her request cannot recover therefor in an independent action against the husband. To so hold would not only jeopardize the marital or separate estate of the husband, thus violating a sound public policy, but ignoring the great weight of opinion elsewhere expressed upon the subject.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1920.

All the Justices concurred.

[Civ. No. 3351. First Appellate District, Division Two.—April 19, 1920.]

F. E. WRIGHT, Respondent, v. JAMES V. BALDWIN,  
Appellant.

- [1] **SLANDER—DAMAGES RECOVERABLE—MALICE—INSTRUCTIONS.**—In an action for slander an instruction, in effect, that if the jury find that the defendant spoke the objectionable words of and concerning the plaintiff, they can award the plaintiff both compensatory and punitive damages, without regard to any consideration of malice or motive, but that they can decline to award damages for the alleged slander only in the event they should find that defendant did not utter the words charged of and concerning plaintiff, is prejudicially erroneous.
- [2] **ID.—EVIDENCE—PROOF OF MALICE.**—Malice is always an issue in an action for slander where plaintiff seeks punitive damages, but such malice may be proved directly or indirectly by direct evidence of the evil motive or intent or by inferences which may be drawn from the facts proved.
- [3] **ID.—INFERENCE OF MALICE—PRESUMPTION—INSTRUCTIONS.**—Although, in awarding punitive damages, the jury may infer malice from an unprivileged utterance of a false charge slanderous *per se*, such inference must be drawn by the jury from the facts proved; it is not a presumption of law which the court itself can make. Failure to so instruct the jury is error.
- [4] **MALICIOUS PROSECUTION—ADVICE OF COUNSEL—ERRONEOUS INSTRUCTION.**—In an action for malicious prosecution an instruction that the jury should disregard the special defense of advice of counsel if they believe from the evidence that defendant did not state "to his attorney or to the district or deputy district attorney, or any or either of them, all the facts within his knowledge," etc., is erroneous in that it requires the jury to find that defendant made a full and fair disclosure of all the facts within his knowledge respecting the transaction complained of to each one of the three attorneys consulted by him, whereas proof of a full and fair disclosure of such facts to any one of the three would have been sufficient to sustain such defense if defendant acted upon the advice of the attorney to whom such disclosure was made.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Wellborn, Judge. Reversed.

The facts are stated in the opinion of the court.

Anderson & Anderson and Bert Campbell for Appellant.

John H. Miller and Edward C. Higgins for Respondent.

NOURSE, J.—This is an appeal by defendant from a judgment, following a verdict, entered against him in favor of plaintiff in a joint action for malicious prosecution and slander. The complaint contained four causes of action, three for malicious prosecution growing out of the arrest and trial of the plaintiff upon a charge of embezzlement and the fourth for slander growing out of statements alleged to have been made by the defendant in the courtroom of a justice of the peace who was conducting the preliminary hearing of the plaintiff upon the embezzlement complaint. Plaintiff was nonsuited on the second and third causes. The jury awarded him damages in the sum of six thousand dollars, with nothing in the verdict to indicate what portion was allowed on each cause of action or what portion was allowed for either compensatory or punitive damages.

Various grounds for reversal have been urged by appellant, the most patent objections going to the error of the trial court in instructing the jury. [1] Upon the cause of action for slander the court, after instructing the jury that the words charged as having been used were slanderous *per se* and that the first duty of the jury was to determine whether those words were used by the defendant of and concerning the plaintiff, gave the following instruction as to the damages which might be awarded under this cause of action: "If you believe from the greater weight of the evidence that they were so used, your verdict will be for the plaintiff, and you will assess such a reasonable sum as his damages as in your sound discretion you believe from the facts and circumstances in evidence will be just and right, and . . . will compensate the plaintiff for the injury to his feelings, etc. . . . You may also allow such a temperate amount by way of punitive or exemplary damages as will serve to prevent or deter said defendant from committing a similar wrong hereafter. If you believe from the evidence that defendant did not utter the words charged in the complaint of and concerning plaintiff, you will, of course, award no damages therefor."

The foregoing were the only instructions given by the court upon the cause of action for slander. All the other instructions related solely to the first cause of action for malicious prosecution. That these instructions failed to present the issues fairly to the jury cannot be doubted. The effect was that, if the jury found that the defendant spoke the objectionable words of and concerning the plaintiff, they could award the plaintiff both compensatory and punitive damages without regard to any consideration of malice or motive, but that they could decline to award damages for the alleged slander only in the event they should find that defendant did not utter the words charged of and concerning plaintiff. [2] Punitive damages being recoverable under section 3294 of the Civil Code, as punishment for the motive of the act complained of, after compensation for the injuries suffered by the act has been made, malice is essential to recovery. Such malice may be proved directly or indirectly by direct evidence of the evil motive or intent or by inferences which may be drawn from the facts proved. (*Davis v. Hearst*, 160 Cal. 143, 163, [116 Pac. 530].) Malice, therefore, is always an issue in an action for slander where plaintiff seeks punitive damages. [3] And though, in awarding punitive damages, the jury may infer malice from an unprivileged utterance of a false charge slanderous *per se*, such inference must be drawn by the jury from the facts proved; it is not a presumption of law which the court itself can make. The failure to so instruct the jury was error.

Criticism is also made of the instruction given at the request of the plaintiff relating to the special defense interposed by the defendant to the first cause of action that the prosecution was not instituted by him until after he had made a full and fair disclosure of all the facts relating thereto to counsel and had been advised by counsel that in his opinion plaintiff was guilty of the crime of embezzlement. The undisputed facts were that, prior to the institution of the criminal proceeding complained of, defendant consulted his own counsel and was by him advised that in his opinion the plaintiff was guilty of embezzlement; and that the defendant and his counsel then presented the facts in their possession to the district attorney of Los Angeles County, who gave defendant the same advice, but suggested that he also present

the facts to one of his deputies in order that a thorough investigation might be made before a warrant should issue for plaintiff's arrest. This was also done and the deputy district attorney gave defendant the same opinion as to plaintiff's guilt.

[4] The instruction complained of was that the jury should disregard said defense "if you believe from the evidence that the said defendant did not state to his attorney *or to the district or deputy district attorney, or any or either of them*, all the facts within his knowledge, . . . "

The vice of this instruction is that it required the jury to find that defendant had made a full and fair disclosure of all the facts within his knowledge respecting the transactions complained of to each one of the three attorneys consulted by him, whereas proof of a full and fair disclosure of such facts to any one of the three would have been sufficient to sustain this defense if defendant had acted upon the advice of the attorney to whom such disclosure was made.

Other errors complained of do not require discussion, as it is unlikely that they will occur upon a new trial.

For the reasons given the judgment is reversed.

Langdon, P. J., and Brittain, J., concurred.

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[Civ. No. 2126. Third Appellate District.—April 19, 1920.]

F. C. DREW, Petitioner, v. THE SUPERIOR COURT OF MENDOCINO COUNTY et al., Respondents.

[1] EXECUTION—SUPPLEMENTAL PROCEEDINGS—IMMATERIAL ERROR IN TITLE—JURISDICTION—CONTEMPT.—Where the given name of the plaintiff is erroneously stated in the order of examination made in a proceeding supplemental to execution, but all the information concerning the action and judgment are fully and accurately given in the order and in the affidavit upon which such order is based, certified copies of which are served on the person to whom such order is directed, the error being such that no one could be deceived or misled thereby, such order of examination is not void and the trial court is not thereby deprived of jurisdiction to render a judgment in contempt for failure to obey the same.



[2] PLEADING — CORPORATE EXISTENCE — ADMISSION BY PLEADINGS — COLLATERAL ATTACK ON JUDGMENT.—The corporate existence of the defendant being established by the failure of the defendant to deny the allegation of that fact in plaintiff's verified complaint, the judgment entered thereon against the corporation is final and conclusive upon said matter and is not open to attack in a proceeding supplemental to execution.

APPLICATION for a Writ of Certiorari to review an order of the Superior Court of Mendocino County, and J. Q. White, Judge, adjudging petitioner guilty of contempt of court. Writ dismissed.

The facts are stated in the opinion of the court.

W. H. Metson and R. G. Hudson for Petitioner.

Robert Duncan for Respondents.

NICOL, P. J., *pro tem.*—This is a petition for a writ of review, by which the petitioner seeks to have an order of the superior court of Mendocino County, adjudging him guilty of contempt of court, annulled and set aside.

The material facts of the matter may be briefly stated as follows: On the twenty-eighth day of October, 1918, in an action then pending in the said superior court of Mendocino County, entitled Phil Lobree, Plaintiff v. L. E. White Lumber Company, a Corporation, and Goodyear Redwood Company, a Corporation, Defendants, judgment was rendered in favor of the plaintiff and against the defendants for the sum of \$7,150, with interest and costs. On the fourth day of August, 1919, Robert Duncan, the attorney for the plaintiff in said action, filed and presented to the judge of said court his affidavit wherein he set forth the rendition of the said judgment; the issuance on November 30, 1918, of an execution against the property of the said judgment debtor, L. E. White Lumber Company, and that the execution was afterward returned wholly unsatisfied; that the said L. E. White Lumber Company had its principal place of business in the city and county of San Francisco; that said F. C. Drew was at the time of the commencement of said action and at all times since has been the president and general manager of the said L. E. White Lumber Company, and that he resides in and has his office in the said city and county

of San Francisco; that the said company owned property and had it in its possession or under its control, not exempt from execution, which it unjustly refuses to apply to the satisfaction of said judgment, and that said Drew, as president and general manager, had property of said company in his possession and under his control, which he unjustly refuses to apply to the satisfaction of said judgment; that the said company had books of account, which were in the possession and under the control of the said Drew, as president and manager thereof, showing the properties belonging to the said company, and also showing the receipts and disbursements of said corporation, and particularly showing the receipts of moneys from the sale of its properties to the Goodyear Redwood Company, and the amounts and disbursements thereof; that the said L. E. White Lumber Company claimed to have received from said Goodyear Redwood Company a large amount in cash, within two or three years, before the making of said affidavit; that the said company and its said president, F. C. Drew, claimed that the said company was solvent and able to pay all its debts, including the said judgment.

The said affidavit prayed for the appointment of a referee in the city and county of San Francisco, and that an order be made requiring said judgment debtor L. E. White Lumber Company by its president and general manager, F. C. Drew, and by its other officers and directors, to appear before the said referee, and to answer concerning the property of said company, and to produce before the referee its books showing the property and moneys belonging to the said corporation.

Upon the presentation of this affidavit the court on the fourth day of August, 1919, made its order appointing one Casper A. Ornbaum referee and ordered the said judgment debtor L. E. White Lumber Company, by its president and general manager, F. C. Drew, and said F. C. Drew, to appear before the said referee on the fourteenth day of August, 1919, at 2 o'clock P. M., and submit to examination and make discovery under oath concerning the property of the said company, and to bring before the referee the books of account of the said company.

This order of the court, together with the said affidavit of Robert Duncan, was duly served on F. C. Drew on the

ninth day of August, 1919, and he failed to appear for examination and no appearance was made for or on behalf of the said L. E. White Lumber Company. The petitioner, F. C. Drew, was thereafter adjudged guilty of contempt of court for failing to obey said order.

The petitioner claims that the superior court of Mendocino County was without jurisdiction to render its judgment in contempt against him, because: (1) The order made by the court for him to appear and submit to an examination was entitled in an action not pending in said superior court, in this, that the said order was entitled "Paul" Lobree vs. L. E. White Lumber Company, a Corporation, et al.; (2) because the judgment sought to be enforced in the supplement proceedings, in which petitioner was adjudged guilty of contempt, was null and void by reason of the fact that said judgment was made and entered in an action brought against L. E. White Lumber Company, which action was instituted after the said company had forfeited its charter by reason of its failure to pay its annual franchise tax, which forfeiture occurred on March 3, 1917.

[1] 1. The affidavit of Robert Duncan above referred to, and upon which the said order to appear for examination was based, was properly and correctly entitled, as follows, to wit: "Phil Lobree vs. L. E. White Lumber Company, et al." This affidavit gave the correct date of the judgment and the amount thereof, and also the date when the judgment was entered and docketed. It recited also the date of the issuance of the execution and the fact that the execution was returned wholly unsatisfied. The order of examination made on this affidavit, as before stated, was entitled "Paul Lobree, Plaintiff," instead of "Phil Lobree, Plaintiff." This error in the title of the cause did not in our opinion render the order void, and no one could be misled by reason thereof.

It is perfectly clear from the statements contained in said order that it was an order for examination made in the case of Phil Lobree vs. L. E. White Lumber Co., a Corporation, et al.; that such is the fact is plain from the following statements contained in the order: It refers to the said affidavit, giving the name of the affiant and stating that he was the attorney for the plaintiff, and further stated that it appeared by the said affidavit "and by the records on

file in said action that judgment was recovered therein against the defendant, L. E. White Lumber Company, a corporation, on the 28th day of October, A. D. 1918, for the sum of Seventy One Hundred Fifty (\$7150) Dollars, with interest and costs, that said judgment was duly entered and docketed in the office of the Clerk of this Court on said date; that an execution against the property of said judgment debtor was on the 30th day of November, A. D. 1918, duly issued to the Sheriff of the City and County of San Francisco, State of California, the county where said judgment debtor and its president and general manager F. C. Drew had their and each of their principal places of business at the time of the issuance of said execution and ever since have had and still have," and also states that said execution was returned wholly unsatisfied.

It likewise appears from the affidavit of the petitioner filed in the superior court of Mendocino County, in answer to the order to show cause, why he should not be punished for contempt; that there was served upon him on the ninth day of August, 1919, a certified copy of said affidavit of Robert Duncan, and also of said order and "that to said affidavit there was attached a certificate of Hale Prather, County Clerk and Ex-officio Clerk of the Superior Court of the County of Mendocino, certifying that he had compared the foregoing copy of an order and affidavit in the case of Phil Lobree, Plaintiff, vs. L. E. White Lumber Company, a Corporation, et al., Defendants, with the original records, as the same remained in his office, and that the same were correct transcripts thereof and of the whole of said original documents."

There can be no question from the foregoing statements contained in the order that it was made in the case of Phil Lobree vs. L. E. White Lumber Company et al., and that the error in the title of the cause is wholly immaterial, as all the information concerning the action and judgment was fully and accurately given in the order and in the affidavit of Robert Duncan, certified copies of which were served on petitioner on the ninth day of August, 1919. The error was merely a clerical error and no one could be deceived or misled thereby. It was held in *Ex parte Gordan*, 95 Cal. 374, [30 Pac. 561], that an order that the husband pay a monthly allowance for the support of a minor child

designated as "Lina" or "Lena" Gordan, was not void as being an order for the support of a different person from "Lena" Gordan though the names are not the same, nor are they *idem sonans*, when it appears that the child is referred to throughout the proceedings as the sole issue of the parties to the action, and is thereby identified.

2. The claim of the petitioner that the judgment is void, because the action in which it was rendered was instituted after the defendant L. E. White Lumber Company had forfeited its charter, by reason of its failure to pay its franchise tax for the year 1916, cannot be sustained. It appears from the record that the action was commenced on the twenty-fifth day of June, 1917. [2] The complaint was verified and alleged, "that said defendant, L. E. White Lumber Company, is now, and was at all the times in this complaint mentioned, a corporation, duly organized and existing under and by virtue of the laws of the state of California." This allegation of the complaint was admitted by the answer of said corporation, in failing to deny the same, and the court found that the said allegation of the complaint was true. The corporate existence of said company being thus established by the said admission of the pleadings, the judgment entered thereon is final and conclusive upon said matter and is not open to attack in this proceeding.

In the case of *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, [112 Pac. 454], there was a special defense in which it was alleged that the plaintiff was a corporation, organized, existing, and doing business under and by virtue of the laws of the state of California. That at all times from its incorporation it has wholly failed to comply with the provisions of the act imposing a license tax upon corporations and had wholly failed to pay its license tax. No evidence was introduced in support of this plea, and judgment was entered in favor of plaintiff. The court said that "the answer itself avers that the plaintiff is a corporation and is engaged in business as a corporation. This is an admission of the plaintiff's corporate capacity to sue. . . . The corporate existence and general capacity of plaintiff thus being established by the admission of the pleadings it was a matter of affirmative defense for the box company to have shown the extraneous fact that plaintiff had failed to com-

ply with the corporation license tax law . . ."; and the judgment in favor of the plaintiff was sustained.

It follows that the petitioner was in contempt of court in failing to obey the order of August 4, 1919, directing him to appear before the referee for examination, and the court was in the exercise of its jurisdiction in holding him guilty of contempt. It is therefore ordered that the writ of review be, and the same is hereby, dismissed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1920.

All the Justices concurred.

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[Civ. No. 3234. First Appellate District, Division One.—April 19, 1920.]

IVA N. RICKER WILMOT, as Executrix, etc., Appellant,  
v. ELMER I. MOODY et al., Respondents.

- [1] ATTORNEY AT LAW—DISTRIBUTION OF NOTE TO LEGATEE—RUNNING OF STATUTE OF LIMITATIONS—NEGLIGENCE—LIABILITY.—Where the legatees under a will, without waiting for formal distribution by order of the probate court, upon their legacies becoming due and payable, enter into an agreement among themselves for the division and distribution of the property which consists, among other things, of a promissory note, and the property is accordingly divided and distributed, the attorneys for the executrix have no further concern therewith, and if, thereafter, the person who receives the promissory note allows the statute of limitations to bar an action thereon, that fact cannot give rise to a claim for damages against the attorneys.
- [2] FRAUDULENT REPRESENTATIONS—ACTION FOR DAMAGES—CONFLICTING EVIDENCE—FINDING—APPEAL.—In an action for damages for the alleged fraudulent representations of an attorney to the effect that a loan made to him would be secured by a mortgage, and

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1. Liability of attorney for negligence or breach of duty, notes, 34 Am. Dec. 89; 33 Am. Rep. 760; Ann. Cas. 1917B, 3, 55.

that such mortgage had been executed as promised and was in the bank, the defendant having testified that the loan was made to him upon his personal note upon the understanding that no security was to be given, and that testimony having found support in the physical circumstances of the transaction, a finding of the trial court in accordance with such testimony cannot be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. H. Merriam, Merriam & Rinehart and Merriam, Rinehart & Merriam for Appellant.

Ticknor & Carter, Edwin F. Hahn, Simpson & Simpson and Elmer I. Moody, *in pro. per.*, for Respondents.

RICHARDS, J.—The plaintiff, as the executrix of the estate of Samuel M. Ricker, deceased, brought this action against the defendants as the members of a copartnership engaged in the practice of law, and who had been employed by her as such to advise and assist her in the probate of the will of the deceased and the administration of his estate, to recover the sum of two thousand dollars.

The complaint contained two counts, the first of which was based upon allegations of negligence in that the defendants allowed the statute of limitations to run against a promissory note for one thousand dollars, executed by one Sylvester M. Rice, and being part of the assets of the estate, so that the amount of the note was lost. The burden of the second count was that the defendants had persuaded and induced the plaintiff, as such executrix, to loan to Elmer I. Moody, one of their number, the sum of one thousand dollars upon his promissory note, representing that the note would be secured by a mortgage on real property of greater value than the amount of the loan; that after the making of said loan and the acceptance by the plaintiff of said note of one thousand dollars executed by Moody, the defendants represented to her that a mortgage securing the same had in fact been executed and was "in the bank," together with a certificate of title relating thereto, whereas in truth no such mortgage had been or ever was executed, and that as the

result of this transaction the estate was damaged in the amount of said loan. Following these averments of the second count and based thereon is an allegation that by reason of the fraudulent representations, facts, and circumstances therein set forth, the defendants fraudulently disposed of the money, goods, chattels, and effects of the estate.

Judgment was prayed against the defendants for the sum of two thousand dollars.

The answer of the defendants denied the material allegations of the complaint, and also pleaded certain special defenses to be hereafter referred to, and in support thereof introduced evidence at the trial that as to the cause of action contained in said first count the plaintiff and her brother and sister, being legatees of the entire estate and entitled to have distributed to them the whole thereof, had by agreement among themselves, and more than one year after the death of the decedent, their legacies being then due and payable, divided among them the personal property of the estate, and had executed and delivered to one another quitclaim deeds to the real property thereof without waiting for formal distribution by order of the probate court, and that the plaintiff under such division had received the Rice note as part of her share of said estate. That at said time the defendants, who had theretofore had possession of the securities belonging to the estate, delivered all of them to the plaintiff and her colegatees, and which delivery occurred about six months before the Rice note became barred by the statute of limitations. That the defendants, through Elmer I. Moody (who, of the members of the partnership, attended exclusively to the affairs of the estate), shortly before the date when said note became outlawed advised and warned the plaintiff to take steps before said date should arrive to have the same collected or renewed, but which advice and warning were not heeded.

As a further defense to this cause of action it was alleged that the plaintiff, suing as executrix of the estate, was not the real party in interest, and that the cause of action, if any, was barred by section 337 to 340, inclusive, of the Code of Civil Procedure limiting the time for the commencement of actions.



As to the second count, the answer of the defendants denied that they persuaded or induced the plaintiff to make said loan to Moody, or that they made any representations that the loan, if made, would be secured by mortgage, or after it was made, that a mortgage securing it had been executed and deposited in a bank; and alleged that the loan was made to Moody individually upon the understanding that it was not to be secured by a mortgage or otherwise.

As to this note also the defendants introduced evidence at the trial that it formed part of the assets of the estate divided among the legatees in the same manner already detailed, and was the property of the legatee to whom in such division it had been assigned.

As to this count of the complaint also the answer of the defendants set forth that the plaintiff, as executrix of said estate, was not the real party in interest, and that the cause of action, if any, was barred by the same sections of the Code of Civil Procedure as pleaded to the first cause of action.

The court made findings in favor of the defendants on both counts of the complaint, setting forth in great detail the facts that it determined had been established by the evidence; and also found in favor of the defendants upon their pleas of the statute of limitations and that the plaintiff was not the real party in interest. Judgment in favor of the defendants followed accordingly.

The main attack upon the judgment is that the findings are not supported by the evidence, and it is also urged that certain findings are inconsistent with each other, and that the decision is against law.

[1] It may be stated at once that while the evidence in the case upon the facts which determined the question of the right of the plaintiff to relief against the defendants was squarely conflicting, there is ample evidence which, if accepted as true by the court, supports its judgment both on the merits and on the bar of the statute. It shows generally that the defendants were employed by the plaintiff to render services as attorneys at law in the probate of the will and administration of the estate of her testator, the defendant Moody, however, attending to this work exclusive of his codefendants. The papers concerning the estate were delivered to him, including the notes and mortgages,

and during the time he held them and until the division of the estate among the legatees he attended to renewals of notes or their collection and such matters, and prepared the necessary documents in connection therewith. At the time of such division, however, the securities of the estate, including the Rice note and mortgage, were delivered to the plaintiff or to her colegatees, and they thereafter exercised control over their respective portions thereof.

In such a situation it cannot, of course, be contended that the defendants, as attorneys for the executrix, had any further concern with them, and if by oversight or neglect the plaintiff—to whose share in the division the Rice note and mortgage fell—allowed the statute of limitations to bar an action upon them, such fact, unfortunate though it be, cannot give rise to a claim for damages against the defendants, or either of them. And if this be true, the question of the bar of the statute becomes immaterial, but the court found this also in the defendants' favor.

[2] The same conflict in the evidence prevents a review by this court of the finding in favor of the defendants on the second count. It was testified to squarely by Moody that the loan was made to him upon his personal note upon the understanding that no security was to be given. This testimony found some support in the physical circumstances of the transaction, and such conflict as there was in the evidence having been resolved in favor of the defendants this court will not disturb the finding of the trial court.

Moreover, this count of the complaint was founded upon alleged negligence and fraud on the part of the defendants. The negligence, if any, occurred in 1911, and the action was commenced in 1917. The fraud is charged to consist in the representation that the defendant Moody would execute a mortgage to secure his note. Assuming, contrary to the court's finding, that such representation was made, it was made some six years before the commencement of the action. It is sought to avoid the three-year limitation against the action, however, by charging a further false representation on the part of the defendants, namely, that such mortgage had in fact been executed as promised and was "in the bank," by which plaintiff was lulled into a sense of security. In view of the finding of the court that none of these representations were made, it seems useless to discuss the suffi-

ciency of an averment and proof of such representation as last made to postpone the setting in motion of the statute of limitations against the fraud by which the loan is charged to have been obtained. Assuming such representation to have been made the plaintiff had the same means of discovering its falsity at the time it was made as she ultimately employed to that end, and there is no proof of any affirmative action on the part of the defendants to prevent her employing such means at any time. It would seem that the making of such a representation, though false, would not postpone the operation of the statute. (*Simpson v. Dalziel*, 135 Cal. 599, [67 Pac. 1080].)

We find no ground for the reversal of the judgment in other points urged by the appellant.

Judgment affirmed.

Waste, P. J., and Gosbey, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1920, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision by the district court of appeal of the first appellate district, division one, we desire to say that we regard the last two sentences of the opinion of the district court of appeal as not in any way essential to a disposition of the appeal, and that our denial of the application is not to be taken as an expression or intimation of opinion as to the correctness thereof.

The application for a hearing in this court is denied.

All the Justices, except Wilbur, J., concurred.

[Civ. No. 3189. Second Appellate District, Division Two.—April 20, 1920.]

JOHN MICHELS, Respondent, v. JOHN F. BURKHARD et al., Defendants; EMMA A. BURKHARD, Appellant.

- [1] **HOMESTEAD—DECLARATION BY WIFE—MOTIVE—COMPLIANCE WITH STATUTE.**—It is immaterial what the motive of the wife may be in declaring a homestead for the joint benefit of herself and her husband on property standing of record in the name of the latter, as it is not legally incumbent upon her to give any reason for her action. All she needs to do is to comply with the statute.
- [2] **ID.—PRESENCE OF BAD MOTIVE—EFFECT OF DECLARATION—JOINT BENEFIT—LEGAL IMPLICATION.**—Even though the wife's purpose in declaring a homestead on property standing of record in the name of the husband is to harass and annoy the latter and to cloud the title to the property, when the declaration of homestead is so made and recorded it places the property described therein beyond the reach of the creditors of the husband, or sale upon execution for his debts, etc., as effectually as though he filed the same himself and to that extent, the declaration is, by legal implication, for their joint benefit.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Reversed.

The facts are stated in the opinion of the court.

W. S. Knott for Appellant.

Samuel D. Weil for Respondent.

**THOMAS, J.**—This is an action to quiet title. The complaint is in the usual form. The answer of the defendant Emma A. Burkhard is a general denial of the material allegations of the complaint. By way of further defense she sets up an alleged declaration of homestead, made, executed, and recorded by her in the year 1912, covering the property involved in this action—which declaration contains recitations that she is actually residing on such property with her family, a son, and that her husband has never made a declaration of homestead on said property or “executed any document claiming a homestead” therein—alleging that there

has been no abandonment or conveyance of the same; that it is in full force and effect and that all the property described in said declaration of homestead is community property, having been acquired by defendants after their marriage otherwise than by gift, devise or descent.

As a "third defense" defendant Emma A. Burkhard alleges that on January 6, 1914, a certain action was pending in the superior court of Los Angeles County, in which she was plaintiff and John F. Burkhard, her codefendant here, was defendant; that said action was an action for her own support and maintenance; that on said last-mentioned date said cause was tried; that the court gave judgment therein decreeing that said defendant pay to said plaintiff the sum of thirty-five dollars per month, and decreeing said judgment a first lien on the land referred to in the present proceeding, as well as other real property not in controversy here; that said judgment was, on the sixteenth day of June, 1914, duly recorded, etc., and that the same has never been reversed, modified or appealed from.

Defendant John F. Burkhard did not answer.

The court found for the plaintiff, after trial of the issues so presented, holding plaintiff to be the owner of the land described in his complaint, "subject only to the lien of a certain decree"—the decree granting support, etc., above referred to. The findings further declare "that claim of defendants, and each and either of them, of any estate or interest in or to any" of said land, "except by virtue of said lien," is without any right whatever; that defendants are now, and at all times mentioned in the complaint were, husband and wife; that defendant Emma A. Burkhard executed said declaration of homestead, and "that all the facts stated in said declaration are true, except as follows: It is not true that the said defendant, Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the said declaration with the intention that it was or should be for the joint benefit of herself and her husband, John F. Burkhard, but she made the said declaration for her sole benefit and for the purpose of harassing and annoying her said husband, and to cloud the title of the real property therein sought to be claimed as a homestead." Judgment was entered accord-

ingly. Defendant Emma A. Burkhard appeals from that portion of the judgment adverse to her.

The only point before us is the validity of the alleged homestead. It is urged by appellant that the finding of the lower court that "it is not true that said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the declaration with the intention that it was or should be for the joint benefit of herself and her said husband, John F. Burkhard, but she made the said declaration for her sole benefit and to cloud the title to the real property therein sought to be claimed as a homestead," is not supported by any evidence, and is against the law. Many cases are cited by appellant, presumably in support of this contention. All, however, go to the question of disclosing the object and purpose of the homestead laws, and give reasons why the description of the property in controversy in the various cases was sufficient—neither of which propositions is at issue here. We therefore consider none of the cases cited in point.

"The burden of showing not only the declaration of the homestead and the recording of the declaration, but also of showing that she was a resident upon the property at the time the declaration was made and recorded, rested upon the plaintiff." (*Machado v. Machado*, 36 Cal. App. 646, [172 Pac. 1124].) We think this requirement was fully met in this case. It is stipulated that ever since November 6, 1901, up to and including November 30, 1912, the record and legal title to this property was in the said defendant husband, and that the latter had not at any time declared or selected the same as a homestead. The record shows that the defendant Emma A. Burkhard brought an action against her husband, John F. Burkhard, in August, 1912, and secured from the court an order excluding him from the premises occupied by them jointly as their home, and that he, the said husband, had complied with said order, having promptly left the premises in question. This order was in full force and effect in November, 1912, the date when the alleged declaration of homestead was executed and recorded by the defendant Emma A. Burkhard. The divorce case was tried in January, 1914, and by the trial court in that action the defendant Emma A. Burkhard, plaintiff there, was ordered from the premises in controversy here to other property

known as the "Elm property," and immediately thereafter she complied with such order, since when neither she nor her son, or either of them, has resided on said premises. On March 21, 1917, the defendant John F. Burkhard made, executed, and delivered to the plaintiff here a deed to the property in question, which instrument was recorded the next day.

[1] As we have already seen, the court found "that all the facts stated in said declaration are true, except as follows: *It is not true that said defendant, Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the said declaration with the intention that it was or should be for the joint benefit of herself and her said husband, John F. Burkhard, but she made the said declaration for her sole benefit and for the purpose of harassing and annoying her said husband and to cloud the title to the real property therein sought to be claimed as a homestead.*" (Italics ours.) We think this finding in effect says: "The declaration of homestead as made and recorded complied in every way with the statutory requirement, but the motive prompting the making of the same is questioned." In our opinion it is immaterial what the motive of the wife may have been, as it is not legally incumbent upon her to give any reason for her action. All she needs to do is to comply with the statute. (*Farley v. Hopkins*, 79 Cal. 203, [21 Pac. 737].) This she unquestionably did. [2] Even although we assume that the wife's motive was entirely bad, as found by the court, the facts still remain that, as a matter of law, when the said declaration of homestead was so made and recorded it actually placed the property described therein beyond the reach of creditors of her husband, or sale upon execution for his debts, etc., as effectively as though he had filed the same himself. To this extent, therefore, the declaration was made for their joint benefit. We think this legal implication, even standing alone, sufficient to support the statement that the declaration was made for their joint benefit. To hold otherwise would be tantamount to denying the very right vouchsafed the wife under the specific terms of the statute. Subdivision 2 of the section covering this phase of the matter, too, would seem to preclude the idea that residence on the property in question by *both* spouses is necessary. At

any rate, it is conceded that the declaration here involved complies with section 1263 of the Civil Code in every particular.

For this reason we hold that the court erred in concluding from the legal facts found that the declaration in question was "null and void and of no effect," and that such error was prejudicial to the rights of this appealing defendant.

Judgment reversed.

Finlayson, P. J., and Sloane, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1920.

All the Justices concurred.

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[Civ. No. 3188. Second Appellate District, Division Two.—April 20, 1920.]

ARTHUR H. PRATT, Respondent. v. ALVIN H. HARROLD, Appellant.

- [1] **ALIENATION OF AFFECTIONS—LETTERS TO WIFE—ADMISSIBILITY OF**  
In an action by a husband for the alienation of his wife's affections, letters written by defendant to plaintiff's wife which show that defendant was, and for some time had been, by no means a passive agent in the love-making, and which tend to corroborate her testimony that defendant made love to her, gained her affections and encouraged her in a plan to obtain a divorce from her husband and marry him, are relevant and competent evidence, where defendant, for defense to the action, pleads and attempts to prove that he is the victim of a conspiracy and that the woman tempted him, notwithstanding such letters did not reach the wife but were intercepted by the husband before their delivery through the mails.
- [2] **ID.—COMPETENCY OF WIFE AS WITNESS.**—In an action by a husband for the alienation of his wife's affections, the wife is a competent witness.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.



Earl Newmire for Appellant.

Wm. H. Morse, Jr., and S. M. Johnstone for Respondent.

SLOANE, J.—This is an appeal by the defendant from a judgment for fifteen hundred dollars for the alienation of the affections of plaintiff's wife.

The only points raised on the appeal are upon the rulings of the court in the admission of evidence. [1] Exception is taken to the introduction of certain letters written by the defendant to plaintiff's wife, a number of which were intercepted by the husband before their delivery through the mails to the wife, and also to the admission in evidence of the wife's testimony. Appellant's brief is very meager in elucidating his points, and there is no brief for respondent.

We think the letters were relevant and competent evidence. They, it is true, not having reached the wife, could not have been influential in diverting her affections from her husband, although they were fervently directed to that end. However, the defendant, for defense to the action, had pleaded and attempted to prove that he was the victim of a conspiracy and that the woman had tempted him. These letters were calculated to show, by their ardent declarations and admissions, that he was, and for some time past had been, by no means a passive agent in the love-making, and tended to corroborate the wife's testimony that defendant had made love to her, gained her affections and encouraged her in a plan to obtain a divorce from her husband and marry him.

[2] The objection that the wife was not a competent witness, under the prohibitions of section 1881 of the Code of Civil Procedure disqualifying a wife as a witness under certain conditions, is not well taken. If this section has ever applied to testimony such as here offered, the limitation has been removed ever since the amendment of 1907, which permits such testimony in an action brought by husband or wife against another person for alienation of the affections of either the husband or the wife.

The wife's testimony was rather perfunctory, and not very conclusive; but appellant concedes that it was, with

other evidence in the case, sufficient, if admissible, to sustain the findings and judgment, and in this we agree with him.

Judgment affirmed.

Finlayson, P. J., and Thomas, J., concurred.

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[Civ. No. 3353. First Appellate District, Division Two.—April 20, 1920.]

WALTER A. MAYR, Respondent, v. W. J. REYNOLDS et al., Defendants; R. H. RAPHAEL et al., Appellants.

[1] PLEDGE—AGREEMENT OF PLEDGEHOLDER TO HOLD PROPERTY—ESTOPPEL.—In this action to establish a first lien in plaintiff upon certain automobile material which, notwithstanding a prior pledge thereof, was pledged to plaintiff as security for a loan, it having been represented to plaintiff that the property had been freed from all prior liens and the corporation pledgeholder, by its president, having agreed to honor only such orders with reference to the delivery of the material as might be issued by plaintiff, the trial court properly held that the corporation pledgeholder was estopped to deny the binding character of the contract made by its president to hold the property subject to plaintiff's orders, and that such president, as an individual, to whom the first note and the interest of the payee therein in the pledge of the security was assigned, and who, through an agent or employee, had purchased the property on a sale thereof to satisfy such first pledge, was estopped to deny that he was bound by the contract of the pledgeholder to hold the property unconditionally for plaintiff.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hollzer & Greenberg for Appellants.

Stephens & Stephens for Respondent.

NOURSE, J.—This is an appeal by defendant R. H. Raphael from a judgment in favor of plaintiff establishing

a first lien in plaintiff upon certain automobile material, and decreeing foreclosure thereof to satisfy plaintiff's claim.

The facts material to the opinion are that on the twenty-fifth day of July, 1916, the Merchants Finance Company, a corporation, loaned to the Beardsley Electric Company, a corporation, \$1,926.45, evidenced by a promissory note in that amount secured by a pledge of the automobile material, which by agreement of the parties was deposited with the defendant R. H. Raphael Realty Company, a corporation; that on the twenty-fifth day of August, 1916, a month after this property had been so pledged and stored in premises leased by and under the possession of the Realty Company, the Beardsley Electric Company borrowed from plaintiff the sum of five thousand dollars, evidenced by its four promissory notes and secured by a pledge of the same material; that before this loan was made the plaintiff learned of the existing claim and lien of the Merchants Finance Company and demanded that the property be cleared either by payment of the existing loan or by release of the security. This he was assured had been done, and as evidence thereof a receipt in the words following was delivered to him by a representative of the Beardsley Electric Company upon his payment to that company of the sum of five thousand dollars: "Received of Walter A. Mayr \$35.00, being one month's rent of one-story brick building located at Eighth & Kohler streets. In addition to the rental for the use of this building, I agree to act as custodian for the electric vehicle material stored therein with respect to count and delivery of it, and I agree to honor only such orders as said Walter A. Mayr may issue to me as to the delivery of said material. R. H. Raphael Realty Co. By R. H. Raphael, Pres."; that on the twentieth day of March, 1917, the Merchants Finance Company sold and assigned to the defendant Raphael as an individual the note of the Beardsley Electric Company which it held, together with its interest in the pledge of the security; that thereafter the Beardsley Electric Company became insolvent and the defendants Raphael and Raphael Realty Company, without notice to plaintiff or to any other person than certain individuals who were acting as agents and employees of these defendants, caused a pretended sale of said property to be made to an agent and employee of said Raphael for two thousand dollars,

although on numerous occasions Raphael had represented to the plaintiff that the value of said property was more than twenty thousand dollars. The trial court found that the Raphael Realty Company, without consideration and in violation of its duty to plaintiff, and for the purpose of defeating the rights of plaintiff, had parted with the possession of the pledged property; that by reason of the circumstances heretofore recited the pretended sale was void and of no effect; that the property was actually in the possession of agents and employees of the defendant Raphael; that said defendant was estopped to deny that he held the security unconditionally for the plaintiff, and that the defendant Raphael Realty Company, by its failure to repudiate the action of its president, and by its retention of the property without any attempt on its part to exonerate itself after having full knowledge of plaintiff's claims and the assurances given to him, was further estopped to deny the binding character of the contract referred to as the "receipt" executed in the name of the company by R. H. Raphael. Upon these findings the court drew the conclusion that plaintiff's claim constituted a lien upon the pledged material prior and superior to any lien of any of the defendants, and gave judgment accordingly. The defendant R. H. Raphael alone appealed.

[1] He attacks the judgment upon the ground that the trial court erroneously held that he was estopped to deny the validity of the pledge of the property made to respondent. The position of the trial judge upon this branch of the case is made clear by his oral opinion rendered at the close of the trial as quoted in appellant's opening brief: "Then the question as to the priority of liens—there is no conflict in the evidence. It appears, as it seems to me, without any conflict, that at this time the Merchants Finance Company did have a valid pledge of these goods which was made in good faith and for value. The Merchants Finance Company itself has never done anything to surrender that pledge or to give any one else priority, and if it still held that note or if it had conducted that sale and bought in the property itself, or caused it to be sold by some process to any third party, who bought it without notice or knowledge of the peculiar circumstances existing between Mr. Raphael and Mr. Mayr, there would be no question in my mind whatever

but that it took precedence of Mr. Mayr's claim here. But we have the curious circumstance that the only man claiming under or by virtue of that Merchants Finance Company lien at this time is Mr. Raphael himself, and, as I have said, it appears to me that he is estopped to deny that Mr. Mayr's pledge was a valid pledge. He is estopped to deny that the Raphael Realty Company did take and hold this property as pledgeholder for Mr. Mayr, undertaking to deliver it solely upon his order, which, as it now seems to me, would warrant this court in finding as against Mr. Raphael that the Raphael Realty Company was then the pledgeholder for Mr. Mayr; and if that finding is warranted, then it seems to me it follows, as a rule of law or a rule of equity rather, that not merely the Raphael Realty Company but Mr. R. H. Raphael, as president of that company and the mouthpiece through which it spoke and the arm through which it acted, are estopped by the relationship of trust and confidence thereby created by them existing between him and his company on the one hand and Mr. Mayr on the other from secretly obtaining any advantage to himself adversely to Mr. Mayr."

The relationship of the appellant during the entire transaction is clearly presented by the evidence. He was vice-president of the Beardsley Electric Company, the borrower of the first loan from the Merchants Finance Company, of which he was also vice-president. He was also vice-president of the Beardsley Electric Company when it negotiated the loan from respondent. He was president of the R. H. Raphael Realty Company, the pledgeholder under both pledges; president of the lessor of the warehouse where the goods were stored; member of the partnership whose employee was the nominal purchaser at the invalid sale, and was the real purchaser at that sale, which was conducted and participated in by persons wholly under his direction and control. Respondent knew of the relation of appellant to these various concerns, and had every reason to believe and rely upon the promises and assurances given him by appellant. That respondent made the loan only upon the written assurance of appellant that he would hold the material in controversy subject only to respondent's order, and upon the repeated assurances that the property was free from all other claims excepting freight and other minor charges which

respondent was assured would be immediately paid, is not controverted. All the facts necessary to estop appellant were present. "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." (Code Civ. Proc., sec. 1962, subd. 3.)

Appellant attempts to escape the unavoidable conclusion that he was estopped under these circumstances by the argument that, if any estoppel exists, the corporation Realty Company and not the appellant individually is estopped; but at the trial he urged that the Realty Company was not estopped because the receipt given respondent was executed by him without authority of the corporation. But the court found that he was the president of the corporation and that the other stockholders left the affairs of the corporation to him, and that it was the custom and practice of the corporation not to question his acts; furthermore, in this particular instance, the corporation, well knowing that the receipt had been issued, made no attempt to repudiate it until an amended answer was filed in this proceeding by a minority stockholder acting without authority of the other stockholders but under advice of counsel for the appellant. The corporation thus ratified the acts of its president and retained the benefits of his contract.

Upon this evidence the trial court correctly concluded that the corporation was estopped from denying the binding character of the contract made by the appellant as its president and that appellant as an individual was estopped to deny that he was bound by the contract to hold the goods unconditionally for respondent.

For these reasons the judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 3320. First Appellate District, Division One.—April 20, 1920.]

DANIEL F. McCAHAN, Appellant, v. LILLIAN McCAHAN, Respondent.

- [1] **DIVORCE—ANTICIPATION OF—AGREEMENT TO PAY COUNSEL FEES—VALIDITY OF.**—An agreement, in advance and in anticipation of a divorce action being brought, to pay counsel fees and costs is void as *contra bonos mores*.
- [2] **ID.—SEPARATION CONTRACT—POWER OF COURT TO DISREGARD.**—In an action for divorce the trial court is not bound by a provision in a contract of separation entered into between the parties wherein it is agreed that, in the event of such an action being instituted, a certain sum shall be awarded to the wife in full settlement of all her claims for counsel fees and costs, but, during the pendency of the action, either in the trial court or on appeal, the trial court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the same.

APPEAL from an order of the Superior Court of Humboldt County directing the payment of costs and counsel fees on appeal in an action for divorce. George D. Murray, Judge. Affirmed.

The facts are stated in the opinion of the court.

Pierce H. Ryan for Appellant.

J. J. Cairns and Henry L. Ford for Respondent.

WASTE, P. J.—This is an appeal from an order directing the appellant to pay to his wife, the respondent, \$343 as costs and counsel fees, on appeal in a divorce action, in which judgment was entered in favor of the plaintiff, and from which judgment the respondent here appealed.

The complaint is on the ground of extreme cruelty. The defendant answered denying the allegations of cruelty, and

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1. Validity of contract intended to facilitate procuring of divorce, notes, 11 *Ann. Cas.* 377; *Ann. Cas.* 1915A, 811; *Ann. Cas.* 1918E, 902.

2. Liability of husband for counsel fees incurred by wife, notes, 15 *Ann. Cas.* 21; *Ann. Cas.* 1917A, 689, 702.

filed a cross-complaint for permanent support and maintenance, and in which she also alleged that a certain contract of separation, theretofore entered into by the parties, was executed by reason of undue influence. This allegation plaintiff denied. The case was tried by a jury which answered all of the special interrogatories, submitted to it, in favor of the plaintiff. These answers were adopted and approved by the court, which made certain additional findings of its own motion. With full knowledge of the facts, it sanctioned the agreement in part, and granted a decree of divorce to the plaintiff. That judgment was affirmed by this court. (*McCahan v. McCahan*, *post*, p. 176, [190 Pac. 460].) A complete statement of the facts of the case is contained in that opinion.

After judgment the defendant moved the court, on affidavits showing she was practically destitute and had no means of her own, for an order directing plaintiff to pay her costs and counsel fees on appeal. The plaintiff filed a counter-affidavit in which he alleged the execution of the contract of separation referred to; that it provided for, and he had paid to the defendant, the sum of one hundred dollars for her costs and counsel fees in the action. He objected to making any further payments and interposed the stipulation of the contract as a bar to the granting of the motion. The court overruled the objection, and, refusing to be governed by the provision of the contract relating to counsel fees and costs, made the allowance complained of. The question presented on this appeal is the right of the court to make the order, in view of the provision in the contract which is as follows:

"6. In the event that any action for divorce shall ever be instituted between the parties hereto, then and in such event it is agreed that there shall be awarded to the party of the second part the sum of One Hundred (\$100.00) Dollars in full settlement of all her claims for counsel fees and costs herein; and it is further agreed that said sum shall be awarded in one action only."

[1] Under our code either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. (Civ. Code, sec. 158.) Notwithstanding this freedom to so contract, it has been repeatedly held in this state that an agreement be-



tween husband and wife to do anything to facilitate procuring a divorce is illegal and void. (*Newman v. Freitas*, 129 Cal. 283, 289, [50 L. R. A. 548, 61 Pac. 907].) We think it requires no lengthy discussion to point out the circumstances under which an agreement in advance and in anticipation of a divorce action being brought, to pay the counsel fees and costs, may operate to facilitate a dissolution of the marriage tie. Such being its effect it is void as *contra bonos mores*. (*Pereira v. Pereira*, 156 Cal. 1, 5, [134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488].)

[2] For another reason the trial court was warranted in disregarding the provisions in the contract relating to counsel fees and costs. Our statute provides that during the pendency of a divorce action the court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the cause. (Civ. Code, sec. 137.) This power is not exhausted upon the rendition of the judgment in the trial court, but continues during the pendency of the appeal. (*Bruce v. Bruce*, 160 Cal. 28, 30, [116 Pac. 66].) The question of the good faith and merit of the appeal is a matter to be considered and determined from the showing made in the lower court and upon which the order for the allowance is based. (*Gay v. Gay*, 146 Cal. 237, 240, [79 Pac. 885].) The courts of this state have consistently recognized and upheld the broad discretionary power vested in the trial judges, by the above section of the code, in these matters. In refusing to sanction an agreement, between an attorney and a plaintiff in a divorce action, for a contingent fee, the supreme court pointed out that in such cases "the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. . . . The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorney's fees, and where the reason ceases the rule or law also ceases." (*Newman v. Freitas*, *supra*.) In yet another case the same court was called upon to construe a contract similar, in effect, to the provision in the agreement we are here considering. It was there said: "nor in the case of suit could the agreement control the action of the court in the exercise of its discretion in allowing alimony or attorney's fees." (*In re Estate of Sloan*, 179 Cal. 393, [177 Pac.

150].) Assuming, as claimed by appellant, but not so holding, that it may have been unnecessary for the court, in deciding the case, to have used the language quoted, we consider the statement significant, as being in complete accord with what we conceive to be the consistent policy of the courts of this state in such matters.

Appellant relies upon the case of *Lee v. Lee*, 55 Mont. 426, [178 Pac. 173], as fully supporting his contention. While the court there takes a view contrary to that which seems to prevail in this state, we are unwilling to accept it as final authority. We are satisfied it is best to leave the matter of costs and counsel fees, in divorce actions, to the discretion of the trial court, in whose exclusive jurisdiction it has been vested by legislative enactment. If it is desirable or expedient to settle these matters out of court, such agreements must be subjected to the examination of the court. (*Loveren v. Loveren*, 106 Cal. 509, 513.) If fair and equitable, the arrangement between the parties will no doubt receive its sanction.

The order is affirmed.

Knight, J., *pro tem.*, and Richards, J., concurred.

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[Civ. No. 3330. First Appellate District, Division One.—April 20, 1920.]

DANIEL F. McCAHAN, Respondent, v. LILLIAN McCAHAN, Appellant.

- [1] **DIVORCE—EXTREME CRUELTY—PLEADING.**—The plaintiff is not required to adopt the exact language of section 94 of the Civil Code in pleading a cause of action for divorce on the ground of extreme cruelty, but it is sufficient if, by appropriate averments, the proper qualification appears.
- [2] **ID.—ABSENCE OF ALLEGATION OF WRONGFUL CONDUCT—SPECIAL DEMURRER.**—Where in an action for divorce on the ground of extreme cruelty the course of conduct of the defendant is set forth in detail and it is alleged "all of which caused plaintiff great shame and humiliation, and inflicted upon him grievous mental suffering," but it is claimed that the complaint is insufficient by

reason of the failure to state that the grievous mental suffering was "wrongfully" inflicted, such alleged defect can be reached by special demurrer, and if not so attacked, it must be held to be sufficient.

- [3] **ID.—GRIEVOUS MENTAL SUFFERING—QUESTION OF FACT—APPEAL.**—Whether in any case the course of conduct complained of constitutes "grievous mental suffering" is a question of fact, the determination of which in the first instance is committed to the judge who tries the action, and his finding that particular acts constitute grievous mental suffering will not be disturbed unless the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion.
- [4] **ID.—SEPARATION AGREEMENT—UNDUE INFLUENCE—FINDING—EVIDENCE.**—In this action for divorce on the ground of extreme cruelty, in which the defendant sought at the trial to avoid the legal effect of a separation agreement, entered into between herself and plaintiff, upon the ground that it was procured by undue influence, the evidence failed to disclose that the defendant was in any way coerced or induced by any means against her will to enter into the agreement.
- [5] **ID.—AGREEMENT FACILITATING MARRIAGE DISSOLUTION — VALIDITY OF.**—An agreement entered into between a husband and wife with the object of dissolving the marriage contract, or facilitating that result, is void.
- [6] **ID.—VOID PROVISION FOR ATTORNEY FEE—VALID PROVISIONS NOT AFFECTED.**—Although that portion of a separation agreement providing for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute a divorce action against the other, is void, such provision will not invalidate the other provisions of the agreement, which are disconnected and separable therefrom and are otherwise valid.
- [7] **ID.—SEPARATION AGREEMENT—CONSIDERATION OF BY TRIAL COURT —CONSTRUCTION OF DECREE.**—The trial court, having jurisdiction of the divorce action, has jurisdiction to consider the separation agreement entered into between the parties, and to affirm it, or to disregard it if it is found to be void; and if the court in its decree makes no division of the property of the parties, or provision for the support of the wife, but does recognize and expressly reserve to her the power to assert such rights and benefits as might accrue to her under the previously executed separation agreement, such action on its part will be construed to be a ratification of the agreement to that extent.

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4. Validity of contract intended to facilitate procuring of divorce, notes, 11 *Ann. Cas.* 377; *Ann. Cas.* 1915A, 811; *Ann. Cas.* 1918E, 902.

[8] **ID.—VALIDITY OF AGREEMENT—REFUSAL TO SET ASIDE.**—The trial court, having found that the separation agreement was fairly made, and not obtained by coercion, intimidation, or undue influence, was correct in refusing to vacate and set it aside.

**APPEAL** from a judgment of the Superior Court of Humboldt County. George D. Murray, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. J. Cairns and Henry L. Ford for Appellant.

Pierce H. Ryan for Respondent.

**WASTE, P. J.**—Defendant appeals from the judgment granting her husband, the plaintiff, a decree of divorce. She also appeals from the order of the court denying her motion for a new trial. The latter appeal was unauthorized and is dismissed. (Code Civ. Proc., sec. 963.)

Were it not for the nature of the action and the situation of the appellant, we would feel justified in dismissing this appeal, or striking the opening brief from the files. It is typewritten, not indexed, only four copies were filed, and no attempt seems to have been made in its preparation to conform to the requirements of rule VIII of this court, [177 Cal. 1, 176 Pac. ix]. Instead of calling the attention of the court to certain parts of the record, as provided in section 953c of the Code of Civil Procedure, the brief appears to contain merely those portions of the voluminous testimony considered, by the appellant, to be favorable to her contentions, without any reference to the transcript, and with but little comment as to the nature and effect of the evidence.

The failure and neglect of appellant in these particulars has not only obstructed our examination of the record, but has rendered it well-nigh impossible for us to use the brief for that purpose. In justification of her failure to print her brief, appellant makes it appear that she is penniless, depending for the greater part of her livelihood upon the charity of relatives; that on motion, and after taking evidence, the superior court made its order directing the respondent to pay to appellant sufficient money to enable her to print her brief; that from this order respondent appealed,

and that appeal is now pending in this court; that the respondent gave a bond staying the execution of the order, thus completely denying appellant the means wherewith to comply with the rule of the court relative to printing her brief. This statement is borne out by the record, and for this reason we have refrained from dismissing the appeal, or striking the brief from the files. There is not, however, sufficient justification for the manner in which the appellant's appeal is presented in the brief. Notwithstanding the labor involved, we have made a complete examination of the record, in considering the points made by the appellant, in seeking a reversal of the judgment and decree.

Defendant denied all the allegations of the complaint, filed a cross-complaint seeking a division of the community property and permanent alimony, and praying that a certain agreement whereby the parties agreed to live separate and apart from each other, providing for disposition of their property, and fixing an attorney fee in the event that an action of divorce should ever be instituted by either of the parties, be declared null and void. The case was tried with a jury which decided in favor of plaintiff, and against the defendant on all the special issues submitted to it. These answers were adopted by the court, which made additional findings of its own. The judgment and decree in favor of plaintiff followed, from which defendant appeals.

Appellant first attacks the sufficiency of the complaint. The plaintiff charged that the defendant secretly accepted the attentions of a man other than her husband, entertaining him in her home both in the daytime and in the night-time, always in the absence of her husband; that she accompanied this man, without the knowledge and consent of her husband, to picnics and dances and associated with him in the privacy of her own home, and in public places, to such an extent that her relations with said man became a matter of common gossip and scandal in the place where the parties resided, all of which became known to plaintiff; that she secreted stolen property in the house of plaintiff and applied vile, insulting names and epithets to him; that she endeavored to strike him with an iron; that she impugned the chastity of his female friends; that she laid down in the public streets, screeching and screaming at the top of her voice; that she frequently threw herself on the

floor, remaining there screaming for hours at a time; that she repeatedly threatened to kill and murder her husband; that she frequently threatened suicide and said she would cut her throat; that she endeavored to get hold of weapons for that purpose; that she quarreled with her husband until late hours of the night; that she attempted to tear out her own hair, and to bite plaintiff's hands; that she did all these things and many others without cause, or provocation, "all of which caused plaintiff great shame and humiliation, and inflicted upon him grievous mental suffering."

Appellant's contention is that by reason of the failure to state that the grievous mental suffering was "wrongfully" inflicted, the complaint is insufficient to state a cause of action for extreme cruelty, under section 94 of the Civil Code. As was said in *Nelson v. Nelson*, 18 Cal. App. 602, 605, [123 Pac. 1099], "If this does not present a case of 'the wrongful infliction of . . . grievous mental suffering' we have totally misconceived the language employed." [1] Furthermore, we do not understand that the pleader is required to adopt the exact language of the statute in pleading the cause of action, under the section mentioned. It is sufficient if, by appropriate averments, the proper qualification appears. As was said in the case last noted, the only rational inference from the allegation of the complaint is that the "infliction" was "wrongful." [2] Furthermore, if there was any defect in the complaint it was one which could have been reached by special demurrer, and not having been so attacked, it must be held to be sufficient. (*Mayr v. Mayr*, 161 Cal. 134, 136, [118 Pac. 546].)

[3] Appellant contends that the acts charged in the complaint, before summarized by us, even if true, did not constitute cruelty. She places her reliance upon the decision of *Waldron v. Waldron*, 85 Cal. 251, 257, [9 L. R. A. 487, 24 Pac. 649], wherein it was decided by a divided court that grievous mental suffering is not the equivalent of extreme cruelty, in a legal sense. The rule there laid down was criticised and overruled in *Barnes v. Barnes*, 95 Cal. 171, 175, [16 L. R. A. 660, 30 Pac. 298]. The more rational rule laid down in that case has been universally and consistently followed in this state ever since. (*Fleming v. Fleming*, 95 Cal. 430, 434, [29 Am. St. Rep. 124, 30 Pac. 566]; *Andrews v. Andrews*, 120 Cal. 184, 187, [52 Pac. 298]; *Smith v. Smith*,

124 Cal. 651, 652, [57 Pac. 573]; *Maloof v. Maloof*, 175 Cal. 571, 573, [166 Pac. 330].)

We deem it unnecessary to here review the voluminous record of the evidence of some thirty witnesses who testified for the opposing sides. No good can be effected by doing so, for the most that the appellant can urge in support of her contention that the findings and judgment are not sustained by the evidence is a conflict of testimony, arising for the most part in the respective stories told by the plaintiff and the defendant. Whether in any case the course of conduct complained of constitutes "grievous mental suffering" is a question of fact. "The judge who tries the action, and has the parties before him for observation in the light of the evidence, is the one to whom the law commits the determination of this question in the first instance, and as was said in *Andrews v. Andrews*, 120 Cal. 187, [52 Pac. 298], this court will not disturb a finding that particular acts constitute grievous mental suffering unless 'the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court.'" (*Avery v. Avery*, 148 Cal. 239, 244, [82 Pac. 967]; *MacDonald v. MacDonald*, 155 Cal. 665, 670, [25 L. R. A. (N. S.) 45, 102 Pac. 927]; *Dupes v. Dupes*, 43 Cal. App. 67, [184 Pac. 425].) We are fully satisfied that the conclusions of the trial court as to the weight and sufficiency of the evidence to support the allegations of the complaint, and the decree of divorce entered thereon, are correct.

[4] Appellant sought at the trial to avoid the legal effect of the separation agreement, entered into between herself and husband, upon the ground that it was procured by undue influence. By this contract the parties agreed to live separate and apart, divided their property, provided for the custody and education of the minor child of the parties, stipulated an amount to be paid monthly for the support and maintenance of the defendant and child, and relinquished to each other all obligations growing out of their marital relations, except as in the contract provided, including the right to inherit one from the other. The agreement also provided for an attorney fee of one hundred dollars "in the event that any action for divorce shall ever be instituted between the parties." This stipulation of the contract imposed no obligation on the wife to sue for a divorce; and the making

of the contract was followed by the actual separation of the parties during which the plaintiff paid the defendant the sum of \$22.50 a month as therein provided for the support of herself and child. The agreement awarded what little community property the parties had to the defendant. The plaintiff, a laborer, has no separate property other than an interest in certain land, which is subject to the life estate of his mother, and which was found by the court to be worth ten thousand dollars.

From the evidence it appears, and the court so found, that prior to the execution of the agreement the plaintiff and defendant had discussed between themselves the subject of the contract which it was proposed by them to enter into, and agreed upon practically all of its terms. On the date of its execution the plaintiff and the defendant went together to the office of the attorney whom the plaintiff had selected and stated to him, both parties being present, the terms which they had agreed upon. In the afternoon of the same day they returned to the office of the attorney, who in the meantime had drafted the agreement. He read it aloud to the parties, explaining the various provisions and terms and stating their meaning to them. Before the document was signed, the defendant was instructed, and advised, by the attorney, that she had the right to consult her own attorney, or adviser, but she declined to do so. Prior to signing the agreement, however, she telephoned to a reputable and competent attorney of Eureka, who later appeared for her and represented her in this action. During the conversation with him she stated she did not desire his aid or advice in the matter of the agreement. The evidence fails to disclose that the defendant was in any way coerced or induced by any means against her will to enter into the contract.

[5] There is no evidence that the agreement was entered into between the parties with the object of dissolving the marriage contract, or facilitating that result. Such contracts are void. (*Newman v. Freitas*, 129 Cal. 283, 289, [50 L. R. A. 548, 61 Pac. 907].) Under our code either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried. (Civ. Code, sec. 158.) They may also agree, in writing, to immediate separation, and may make provision for the support of either of them, and of their



children during such separation. (Civ. Code, sec. 159.) The agreement in question was apparently drawn pursuant to the authority thus given, and was one which the parties had the right to enter into. (*Pereira v. Pereira*, 156 Cal. 1, 4, [134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488]; *Walker v. Walker*, 14 Cal. App. 487, 493, [112 Pac. 479].) [6] Although that portion of the agreement, providing for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute a divorce action against the other, is void (*McCahan v. McCahan*, ante, p. 173, [190 Pac. 458]), it relates to a different subject, and is entirely distinct, disconnected, and separable from, and does not invalidate, the valid provisions of the contract. (*Estate of Sloan*, 179 Cal. 393-397, [177 Pac. 150]; *Mack v. Jastro*, 126 Cal. 130, 134, [58 Pac. 372]; *Beard v. Beard*, 65 Cal. 354, 356, [4 Pac. 229].)

[7] The trial court having jurisdiction of the divorce action, had unlimited authority to make disposition of the community property of the parties. (Civ. Code, secs. 146, 147.) Whenever, therefore, it was made to appear that a division of the property had been made in accordance with the terms of the separation agreement, the court necessarily had jurisdiction to consider the instrument, and to affirm it, or to disregard it if it was found to be void. "Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts.'" (*Loveren v. Loveren*, 106 Cal. 509, 513, [39 Pac. 801].) The court, in the instant case, in its decree made no division of the property of the parties, or provision for the support of the defendant, but did recognize and expressly reserve to her the power to assert such rights and benefits as might accrue to her under the previously executed articles of separation. This action on its part we construe to be a ratification of the agreement to that extent.

[8] Measured by the standard of the code provisions, and construed in the light of the circumstances surrounding its execution and subsequent performance, it is manifest that in so far as it deals with the property rights of the parties, the contract is a valid agreement with which the court could not interfere, unless, from the evidence, it was authorized to find that it was procured in violation of the general rules

which control the actions of persons occupying confidential relations with each other. It did not so find. Being fairly made, and not being obtained by coercion, intimidation, or undue influence, the trial court was correct in refusing to vacate and set it aside. (*Murray v. Murray*, 28 Cal. App. 533, 535, [153 Pac. 248].)

The judgment is affirmed.

Richards, J., and Knight, J., *pro tem.*, concurred.

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[Civ. No. 2563. Second Appellate District, Division Two.—April 20, 1920.]

MRS. MANIMA BURTON COREY, Respondent, v. JOHN E. MATOT et al., Appellants.

[1] HOMESTEAD—DECLARATION ON MORTGAGED PROPERTY—EXTENSION OF LIABILITY BY HUSBAND—PRIORITY OF HOMESTEAD—STATUTE OF LIMITATIONS.—Where the wife declares and files a homestead on real property which is subject to a mortgage which she and her husband had executed as security for their promissory note, and thereafter and after the maturity of such note, but before the running of the statute of limitations, the husband, without the knowledge or consent of the wife, enters into a stipulation and agreement in writing with the payee of the note and mortgage of the property extending the time of payment on said note and mortgage, such extension of the liability does not preserve the lien of the mortgage as against the homestead after the statute of limitations has run against the liability as originally created.

APPEAL from a judgment of the Superior Court of San Bernardino County. H. T. Dewhirst, Judge. Reversed.

The facts are stated in the opinion of the court.

Kenneth E. Matot, Hert & Watt and Porter, Morgan & Parrot for Appellants.

Allison & Dickson for Respondent.

SLOANE, J.—In this case the defendants, John E. Matot and Mary E. Matot, husband and wife, had executed to the

plaintiff their promissory note secured by mortgage upon certain real property. Thereafter, and before the maturity of the note, the defendant Mary E. Matot declared and filed a homestead on the property in conformity with section 1263 of the Civil Code, for the benefit of herself and family. After the maturity of the note, but before the running of the statute of limitations, the defendant John E. Matot, without the knowledge or consent of his wife, entered into a stipulation and agreement in writing with the payee of the note and mortgagee of the property extending the time of payment on said note and mortgage. After the statute of limitations had run on the obligation as originally evidenced by the promissory note, but prior to the date of payment as covered by the extension, this action was brought to foreclose the mortgage, in satisfaction of the liability on the note. The court found that the defendant John E. Matot was liable under the obligation of the note as extended, and decreed the foreclosure and sale of the property to pay the amount of such indebtedness. The appeal is taken by both defendants from the judgment of foreclosure.

[1] The only question to be decided is, whether the extension of the liability of the defendant John E. Matot upon the promissory note preserved the lien of the mortgage as against the homestead after the statute of limitations—which was pleaded—had run against the liability as originally created.

The contention of appellants is that the husband alone had no right to extend or prolong the period of the lien, as affecting the homestead, beyond the liability as defined by the note and mortgage at the date of filing the declaration of homestead. In support of this contention they cite and rely upon the rulings of the supreme court in *Barber v. Babel*, 36 Cal. 11, *Wells v. Harter*, 2 Cal. Unrep. 52, *Hart v. Church*, 126 Cal. 476, [77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296], and *Ainsworth v. Morrill*, 31 Cal. App. 510, [160 Pac. 1089]. Only the first of the decisions cited is closely in point. In *Wells v. Harter* the facts are not very fully stated, but it appears from the opinion that the four years period of limitation had run before the agreement for extension, by the husband alone, of the time of payment was entered into. Presumptively the bar of the statute, which was pleaded, applied. It is clear that an agreement

made after the cause of action was barred by the statute of limitations was the creation of a new liability, not a mere extension of the old one, and would not be effective as to a homestead without the consent of the wife. *Hart v. Church*, which, while it quotes with approval *Barber v. Babel*, is quite different in its facts from those set out in that case or in the case at bar; and all that the court decides is that a homestead cannot be relinquished, alienated, or encumbered without the joint and concurrent act of both husband and wife. If the question here arose upon the admitted creation of a new lien, the citation would be conclusive against it. But the ground upon which the decree of foreclosure here is sought to be upheld is that the extension of the mortgage lien was not the creation of a new lien, but a continuance of the old. *Ainsworth v. Morrill* only declares the same rule, that the homestead right can only be affected by the joint act of husband and wife.

We are of the opinion, however, that the decision of the supreme court in *Barber v. Babel*, *supra*, is controlling in the appellants' favor in this case. There, as here, the premises in question had been mortgaged by husband and wife to secure their joint note. They subsequently, before maturity of the note, filed a declaration of homestead on the property. Later, before the statute of limitations had run, the husband, without the wife joining therein and without her knowledge or consent, executed a new note and mortgage for the debt, and the old mortgage was satisfied of record. Suit was brought to foreclose the new mortgage after the statute of limitations had run on the old; and it was held that the new mortgage did not create a lien on the homestead. If this were the end of the matter, respondent's contention that the decision is not in point would be beyond dispute. The new mortgage was an attempt of the husband alone to create a new lien on the homestead property. But this case goes further. The plaintiff in the foreclosure action alleged fraud on the part of Frederick Babel, the husband, in securing the release of the old mortgage by representing that there was no homestead on the property, and it was sought to have the fraudulent satisfaction of the old mortgage disregarded and set aside and to grant plaintiff relief by foreclosure under the first mortgage. That the giving of this new note under the circumstances stated was

in effect an extension of the old debt as to the husband, there can be no doubt, and the court in that case so recognizes it. But it further holds that the wife was not estopped by the acts of her husband, and that he could not by such means prolong the lien on the homestead. As is said by the court in this connection: "The giving of the new note and extending the time of payment were also the act of the husband alone, to which the wife was no party. Under the authorities cited he could no more effect the same purpose by continuing the old lien beyond the time when the action would be barred as to the wife than in the direct mode attempted of executing a new mortgage and discharging the old." And again: "Had the suit now under consideration been brought before the action on the old note and mortgage was barred, and no question under the statute of limitations had arisen, then there would have been some analogy between the cases; for it could well have been said that the execution of the second note and mortgage, and surrender of the first, and cancellation of the mortgage upon the record, had been procured by fraud, and the transaction being void on that ground, the old note and mortgage would be still alive and unaffected by it. The satisfaction being void, there would then have been a valid live mortgage. But in this case, if we consider the new note and mortgage and the discharge of the old mortgage void on the ground of fraud, the old cause of action is itself barred by the statute, and no action can be maintained upon the mortgage unless a new right has been acquired against the wife and the homestead estate, and this new right could not be created by the act of the husband alone in any form."

Counsel for respondent, in contesting this doctrine, cite a number of decisions from other states: *Jackson v. Longwell*, 63 Kan. 93, [64 Pac. 991]; *Billingsley v. Niblett*, 56 Miss. 537; *Hambrick v. Jones*, 64 Miss. 240, [8 South. 176]; *Roberts v. Roberts*, 10 N. D. 531, [88 N. W. 289]. The first of these does not involve a homestead right; and all the others are cases in which the mortgage was originally executed by both husband and wife after the homestead was created. These decisions do hold that a mortgage so executed may be foreclosed against the homestead so long as the principal debt exists against the husband, although barred as to the wife. To the contrary, in a Texas case (*San Antonio Real*

*Estate etc. Assn. v. Stewart*, 27 Tex. Civ. App. 299, [65 S. W. 665]), it is held that a husband cannot waive the wife's rights or extend a lien created on the homestead by a joint mortgage by an act in which the wife does not join. In none of these cases is the state law governing the homestead set forth, and their applicability under the homestead laws of California is therefore left somewhat obscure. They in no event touch the distinction which exists in the case at bar and in *Barber v. Babel*, *supra*. The opinion in the latter case is a well-considered discussion of the nature of the homestead estate by Chief Justice Sawyer, and the doctrine there laid down does not seem to have been questioned in any subsequent California decision.

The ground of distinction between a mortgage executed by both husband and wife upon an existing homestead and one where the homestead is declared subject to a previously executed mortgage would seem to be that in the instance of a pre-existing homestead the mortgage is an express encumbrance of the homestead interest, evidenced as required under the homestead laws. The homestead is thereby dedicated to the payment of the debt, and is subject to the continued existence of the debt as to either of the parties to the mortgage; while in the case of a mortgage made prior to the homestead declaration, only the title as it then stands is pledged. The subsequent declaration of a homestead creates a new and distinct species of title in the property. This newly created interest is under the statute subject to the existing mortgage, but only within the application of the strict terms of the mortgage liability. It cannot be extended or prolonged by implication or by the acts of one alone of the makers, but only in the manner provided by the statute for encumbering or alienating a homestead. The effect of grafting the new homestead right upon the title is similar to the effect of a conveyance of the mortgaged premises to one not bound by the contract of the note and mortgage. The rule is stated, in discussing this point, in *Barber v. Babel*, *supra*, as follows: "The cases of *Lord v. Morris*, 18 Cal. 482, *Lent v. Morrill*, 25 Cal. 499, *Lent v. Shear*, 26 Cal. 370, *Low v. Allen*, 26 Cal. 141, and other cases to the same effect, establish the principle that after a conveyance of the mortgaged premises, or the transfer of any interest therein, the mortgagor has no power to create,

revive, renew, or prolong a charge upon the premises or interest therein, so conveyed or transferred, while such interest remains in another party. . . . The principles established by these cases directly apply to the case under consideration. The original note and mortgage were valid, but subsequent to the making of this mortgage the defendants duly recorded their declaration of homestead, and thereby became jointly vested with new and important rights, which were inalienable, except in the mode prescribed by statute. The wife acquired a new, distinct, personal interest, which she did not before have, and which she afterward could not be deprived of by any act of the husband." Under subdivision 4 of section 1241 of the Civil Code, the homestead is made subject to "debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The same is true of conveyances of estates subject to debts secured by mortgage; but in either instance can the liability against the interest created by the homestead declaration or the conveyance be enlarged or extended without the consent of the parties in interest. And in the case of a homestead right, such consent can only be evidenced by writing, jointly and concurrently executed by the homestead parties. (Secs. 1242, 1243, Civ. Code.)

We find nothing in the case of *First Nat. Bank v. Merrill*, 167 Cal. 392, [139 Pac. 1066], cited by respondent, that affects our conclusion in this matter. In that case the alleged mortgage was executed in a manner to create a valid lien on the property described, which was not at the time of the execution of the instrument covered by a homestead. It was held that a subsequent homestead filing on the property was subject to this mortgage, although it had not been executed in a manner that would have created a lien had the homestead existed at the time of its execution. This view of the law is unquestioned. There is no claim, however, that the original lien in that case had expired or in any way become ineffective, and it does not involve the effect of any attempt to prolong or extend its operation.

The judgment is reversed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 3385. First Appellate District, Division Two.—April 21, 1920.]

**FRANK SCHILLING, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.**

- [1] **WORKMEN'S COMPENSATION ACT—EMPLOYMENT OF ATTORNEY BY APPLICANT—AGREEMENT FOR ATTORNEY'S FEES—REVIEW OF BY COMMISSION.**—An applicant for compensation under the Workmen's Compensation Act is entitled to be represented by counsel in proceedings before the Industrial Accident Commission; and if an applicant, who has entered into a contract employing an attorney and agreeing to pay him a given fraction of the amount recovered as compensation for the services to be rendered, seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid.
- [2] **ID.—REASONABLENESS OF FEE—JURISDICTION OF COMMISSION.**—On such a hearing the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

**PROCEEDING** in *Certiorari* to review an order of the Industrial Accident Commission fixing compensation of counsel for legal services rendered to an applicant. Order annulled.

The facts are stated in the opinion of the court.

Frank Schilling, *in pro. per.*, for Petitioner.

Warren H. Pillsbury and A. E. Graupner for Respondents.

**THE COURT.**—Petitioner instituted this proceeding in *certiorari* to review the order of the Industrial Accident Commission fixing his compensation, after rehearing, for legal services rendered to an applicant for compensation



under the provisions of the Workmen's Compensation Insurance and Safety Act.

[1] It appears from the record that the applicant, having been injured while in the course of his employment, consulted petitioner, who is an attorney at law, and through his advice and counsel procured temporary compensation from the insurance carrier; that thereafter he obtained other employment, during the course of which he was again injured and again consulted petitioner; and that thereafter, as the result of further consultation with petitioner, he was advised that he might apply for permanent compensation as the result of the first injury upon medical testimony which it was deemed possible to procure at that time. This application was made through the advice and assistance of petitioner, and a partial hearing was had thereon before the commission, wherein the evidence was very unfavorable to the applicant; but thereafter, through the advice and activities of petitioner, a settlement was made with the insurance carrier for \$650, which was approved by the commission and subsequently paid. It further appears that at the time of the approval of this settlement the commission fixed the compensation for petitioner's legal services at \$45 without a hearing; that at the request of petitioner a rehearing was granted by the commission for the purpose of determining the reasonableness of the order fixing such fee. Petitioner claimed that he had an oral contract with the applicant for the payment of one-third of the amount recovered from the insurance carrier, which amount included payment for legal services rendered by him to the applicant in matters not directly connected with the proceeding in which the recovery was had. He insisted that this contract should not be declared void *in toto*, and that in any event the allowance of forty-five dollars was wholly unreasonable in payment for the legal services which he had rendered in the proceeding before the commission.

As disclosed by the record filed by respondent herein, the attitude of the referee to whom the rehearing had been referred by the commission was extremely hostile and prejudicial to the petitioner throughout the entire proceedings. Immaterial and irrelevant testimony was taken for the purpose of attacking the professional standing of petitioner; the referee took petitioner's witnesses out of his hands, con-

ducted their examination in his own way, refused to permit petitioner to cross-examine witnesses who were antagonistic to him, and studiously obstructed petitioner in his attempts to produce testimony favorable to his cause.

Counsel for respondent states that there is but one question involved in this proceeding: "What was the value of the services performed by petitioner . . . ?" or "Has the Industrial Accident Commission authority under sections 24(b) (1) and 24(d) of the Workmen's Compensation, Insurance and Safety Act, to fix the fees of attorneys representing applicants before it?" This court is unable to determine the value of the services performed by the petitioner because the referee to whom that matter was referred for adjudication failed to give petitioner a fair opportunity to make proof of such value. That the Industrial Accident Commission has authority under the sections cited to fix fees can scarcely be questioned. Section 24, subdivision (b) (1) authorizes the commission to fix and determine a reasonable attorney's fee for legal services pertaining to any claim for compensation or application filed therefor. No constitutional objection has been raised to this provision of the act, and it may, therefore, in this proceeding, be taken for granted that the power is one which the commission may lawfully exercise. Subdivision (d) of the same section provides that "no claim or agreement for the legal services or disbursements . . . in excess of a reasonable amount, shall be valid or binding in any respect, and it shall be competent for the commission to determine what constitutes such reasonable amount." No constitutional objection has been raised to this provision of the act and, for the purpose of this proceeding, it also may be assumed to be valid. But it must be evident that if the obligation of a contract to pay for legal services, which has been executed by parties legally competent to contract, is to be impaired by the order of the commission solely on the ground that it is unreasonable, some semblance of a judicial hearing must be accorded the contracting parties before such order is made. [2] Furthermore, the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the

payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

An applicant for compensation is entitled to be represented by counsel in proceedings before the commission. There is no odium attached to counsel who render such services. Though the efforts of the commission to protect the interests of applicants for compensation are highly commendable, it is just as important that other persons coming within its jurisdiction be treated with equal justice. If a party who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid.

That petitioner in this case did not receive such a hearing is too plain to question. The award of forty-five dollars as compensation to petitioner for the services admitted to have been rendered by him in the proceedings before the commission is less than the ordinary charge made by attorneys for the collection of a promissory note without any form of legal proceedings. Upon the meager showing petitioner was permitted to make it is apparent that the fee allowed was unreasonably low for the services rendered. But, as heretofore stated, it is impossible for this court to determine what allowance should be made for the services rendered because the referee failed to permit petitioner to fairly present his evidence on that issue.

For these reasons the order of the commission is annulled.

[Civ. No. 2077. Third Appellate District.—April 21, 1920.]

OUTER HARBOR DOCK AND WHARF COMPANY (a Corporation), Appellant, v. COUNTY OF LOS ANGELES (a Body Politic and Corporate), Respondent.

[1] **TAXATION—IMPROVEMENTS ON PUBLIC LANDS—LIABILITY TO ASSESSMENT.**—Though land in this state may be exempt from taxation because it belongs to the city, to the state, or to the United States, improvements made thereon by an individual for his own use and benefit are subject to assessment and taxation.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Andrews, Toland & Andrews and Andrews, Toland, Gregg & Andrews for Appellant.

A. J. Hill and Robert B. Murphey for Respondent.

**BURNETT, J.**—The action was brought to compel the defendant to refund taxes assessed and collected on a wharf and two warehouses constructed by plaintiff on certain lands at San Pedro, owned by the state of California, and leased to the plaintiff. The case, in some general respects, is similar to that by the same plaintiff against the city of Los Angeles ([Cal. App.], 193 Pac. 137), and we shall not repeat the facts therein set forth. The only contention of appellant herein is that said improvements are exempt from taxation by reason of the fact that, being attached to the land, they are in contemplation of law a part of the land, and, therefore, in the same category as the land itself, which is not taxable, since it belongs to the state. In *San Francisco v. McGinn*, 67 Cal. 110, [7 Pac. 187], the question, though, is directly met and unequivocally decided contrary to appellant's claim. Therein a certain school lot in the city of San Francisco, which had been dedicated for school purposes forever (and therefore incapable of private ownership) was, pursuant to a special statute, leased to McGinn for a period of fifty years. The lease contained no provision relating to the construction of

improvements by the lessee, or entitling the lessee to remove any improvements. McGinn constructed a four-story frame building with basement, with a brick foundation, permanently imbedded in and attached to the soil. The improvements were assessed for taxation to McGinn for the year 1881-82, and the suit was brought to collect said taxes. In McGinn's answer to the complaint, he alleged that "said property mentioned in the complaint, and the whole thereof, at the time of the making of said supposed assessments and the levying of said supposed taxes, . . . was, and the whole thereof, and still is the property of the city and county of San Francisco, and lawfully dedicated to public school purposes forever, for the public school educational purposes of said city and county, and of the state of California.

"That the improvements mentioned in the complaint are and always have been permanently attached to and are part of said real estate and lot of land described in the complaint, and themselves real estate.

"That the property mentioned in the complaint as having been assessed is not nor any part thereof, and has never been, personal property."

The foregoing indicates the theory of McGinn upon which he claimed his exemption from taxation. The lower court, however, rejected his contention, and the supreme court affirmed an order denying the motion for a new trial. Appellant suggests that the opinion in said cause is extremely short and that probably the question involved was not thoroughly considered. There is also an intimation that the case is distinguishable by reason of the fact that therein the fee was capable of private ownership. But, in answer, it may be said that the decision has not been overruled; on the contrary, has been recognized since as sound by the supreme court, and that on appeal substantially the same points were made by counsel for McGinn as appear in appellant's brief herein. It should be sufficient, therefore, to quote from said decision the following: "It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, *for the purposes of revenue, the legislature of this state has observed a distinction between real estate and improvements*, and that distinction has been recognized by this court. . . . We are of opinion that, *for the purpose of*

revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes." [1] Indeed, the rule is thoroughly settled in California that, though the land may be exempt from taxation because it belongs to the city, to the state or to the United States, yet improvements made thereon by an individual for his own use and benefit are subject to assessment and taxation. In support of the proposition, we may cite these additional decisions of our supreme court: *Fall v. City of Marysville*, 19 Cal. 391; *People v. Shearer*, 30 Cal. 645; *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638; *San Pedro etc. R. R. Co. v. City of Los Angeles*, 180 Cal. 18, [179 Pac. 393].

The doctrine of the law as thus expounded relieves us of the necessity for a consideration of other cases cited by the parties herein or any independent investigation of the subject.

It is due appellant's counsel to say that they have filed no reply brief, having concluded, no doubt, that respondent's position is impregnable.

The judgment is affirmed.

Hart, J., and Ellison, P. J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 21, 1920, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1920.

All the Justices concurred.

[Civ. No. 3434. First Appellate District, Division Two.—April 22, 1920.]

**E. B. GOULD**, as Special Administrator, etc., Petitioner, v.  
**THE SUPERIOR COURT OF THE CITY AND  
COUNTY OF SAN FRANCISCO** et al., Respondents.

- [1] **DIVORCE—INTERLOCUTORY DECREE—STATUS OF PARTIES.**—Under the provisions of section 132 of the Civil Code, the marital status of the parties is not affected by the interlocutory decree of divorce, further than that it establishes conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the right to a divorce upon the expiration of the statutory period of one year, which must elapse between the entry of the interlocutory decree and the final judgment dissolving the marriage.
- [2] **ID.—SETTLEMENT OF PROPERTY RIGHTS.**—Husband and wife may agree in regard to their real property rights, and may change the character of community property to separate property; and a court has power to do so in an action between them where such disposition is essential to a proper determination of their relative rights.
- [3] **ID.—FINALITY OF INTERLOCUTORY DECREE.**—The statutory interlocutory decree in divorce suits in this state is final, except as against such attack as is authorized by statute.
- [4] **ID.—EFFECT OF INTERLOCUTORY DECREE ON RIGHTS OF PARTIES.**—An interlocutory decree of divorce so far as it determines the rights of the parties is a contract between them, temporary and provisional in its nature, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being at least, restored.
- [5] **ID.—INTERLOCUTORY DECREE—DEATH OF SPOUSE—TERMINATION OF MARITAL STATUS.**—The death of either of the spouses after the entry of an interlocutory decree of divorce terminates the marital relationship, the entry of a final decree thereafter having no effect upon the personal status of the surviving spouse.
- [6] **ID.—DEATH OF HUSBAND — RIGHTS OF WIFE — SUCCESSION.**—Upon the death of the husband the rights of the wife under the laws of succession, if he died intestate, are fixed, unless those rights have theretofore been changed by contract with the husband.

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6. Effect on property or marital rights of death of one party before final decree of divorce, note, *Ann. Cas.* 1914B, 1094.

- [7] **ID.—INTERLOCUTORY DECREE—WHEN FINAL.**—Where no appeal is taken from an interlocutory decree of divorce and it is not set aside under section 473 of the Code of Civil Procedure, it becomes final and conclusive at the expiration of six months from its entry.
- [8] **ID.—MOTION TO SET ASIDE FINAL DECREE—JURISDICTION—PROHIBITION.**—A writ of prohibition will lie to restrain a superior court from entertaining a motion to set aside a final decree of divorce after the expiration of the time provided by section 473 of the Code of Civil Procedure.
- [9] **ID.—INTERLOCUTORY DECREE—DEATH OF SPOUSE—PROPERTY RIGHTS—JURISDICTION TO ENTER FINAL DECREE.**—While the death of one of the spouses after the entry of an interlocutory decree of divorce and before the entry of the final decree divests the court of jurisdiction to make a final decree dissolving the marriage status, the property rights of the parties fixed by an agreement between them and confirmed by the interlocutory decree remain in existence, and as to them the court retains jurisdiction to enter the final decree in the manner specified in the interlocutory decree. (Opinion of supreme court on denial of hearing.)

**APPLICATION** for a Writ of Prohibition to prevent the Superior Court of the City and County of San Francisco, and E. P. Shortall, Judge, from setting aside a final decree of divorce. Writ issued.

The facts are stated in the opinion of the court.

Walter E. Drobisch and Frank Freeman for Petitioner.

Joseph A. Brown and Fabian D. Brown for Respondents.

**THE COURT.**—The petitioner, as the special administrator of the estate of Frank H. Gould, deceased, seeks by prohibition to prevent the superior court and the Honorable E. P. Shortall, one of its judges in San Francisco, from setting aside a final decree of divorce entered after the death of petitioner's intestate.

In his lifetime Frank H. Gould was the husband of Nettie Gould. There was one child of the marriage, a daughter who was between sixteen and seventeen years old in October, 1916, when the husband sued for divorce. After answer and cross-complaint the trial resulted in an interlocutory decree of divorce in favor of the wife. It was dated January 19, 1918. The court found there was community property which except as hereinafter stated was not described in



the findings. The divorce was granted on the ground of willful desertion by the husband. The decree recited that the parties had agreed in open court "to the division of the community property and the provision for alimony as hereinafter provided." The provisions referred to were that the husband pay the wife as permanent alimony and for her support the sum of seventy-five dollars per month, commencing on January 21, 1918; that he should pay her immediately two thousand five hundred dollars in cash; that out of the community property and the homestead there be assigned and allotted to the wife a certain lot of land in San Francisco, together with the dwelling-house and other improvements thereon and all the furniture and personal property contained therein, "the same to be her sole and separate property and estate." It was ordered that the plaintiff pay and discharge a certain encumbrance upon said real property within three years, and in the interim that he should pay all interest and other charges secured by mortgage, "it being the true intent of this decree to award said real property to the defendant, Nettie Gould, free and clear of encumbrances, but to allow the said Frank H. Gould the said period of three years from and after date hereof within which to discharge the said lien or encumbrance." All other property of the community was expressly assigned and allotted to the plaintiff free and clear of all claim of the defendant. It was further decreed that each of the parties respectively should immediately execute and deliver to the other quitclaim deeds conveying the respective property, and providing that if either party should fail or omit to make the deed within a period of ten days after the date of the decree, the clerk of the court execute the deed to carry the decree into effect. The last clause of the decree provided that upon the expiration of one year final judgment granting the defendant a divorce, "and providing for the permanent alimony and support of defendant and the division and allotment of the community property, and other relief, as hereinbefore in this interlocutory decree provided, be entered herein." The decree was recorded on January 21, 1918.

[1] Under the provisions of section 132 of the Civil Code, the marital status of the parties was not affected by the interlocutory decree, further than that it established

conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the defendant's right to divorce upon the expiration of the statutory period of one year, which must elapse between the entry of the interlocutory decree and the final judgment dissolving the marriage. (*In re Seiler's Estate*, 164 Cal. 181, [Ann. Cas. 1914B, 1093, 128 Pac. 334]; *Pereira v. Pereira*, 156 Cal. 9, [134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488]; *Estate of Walker*, 169 Cal. 400, [146 Pac. 868]; *Brown v. Brown*, 170 Cal. 1, [147 Pac. 1168]; *London Guaranty etc. Co. v. Industrial Acc. Com.*, 181 Cal. 460, [184 Pac. 864].)

In so far as the interlocutory decree affected the property rights of the parties, it appears from the facts in the record that they agreed to the division of the community property in accordance with the terms of the decree. [2] Husband and wife may agree in regard to their real property rights, and may change the character of community property to separate property. A court has the power to do so in an action between them where such disposition is essential to a proper determination of their relative rights. (*Fay v. Fay*, 165 Cal. 469-472, [132 Pac. 1040].) [3] Despite the old equity rules under which preliminary interlocutory orders had none of the characteristics of final decrees, the statutory interlocutory decree in divorce suits in this state is final, except as against such attack as is authorized by statute (*Suttman v. Superior Court*, 174 Cal. 243, [162 Pac. 1032]; *Bancroft v. Bancroft*, 178 Cal. 367, [173 Pac. 582].)

[4] The interlocutory decree constituted a contract between the parties, both because the provisions for division of the community property were by consent and because "a judgment is a contract, in the highest sense of the term." (*Wallace v. Eldredge*, 27 Cal. 498; *Stuart v. Lander*, 16 Cal. 372, [76 Am. Dec. 538]; *Bean v. Loryea*, 81 Cal. 151, [22 Pac. 513]; *Dore v. Thornburgh*, 90 Cal. 64, [25 Am. St. Rep. 100, 27 Pac. 30]; *Weaver v. San Francisco*, 146 Cal. 728, [81 Pac. 119].) The interlocutory decree so far as it determined the rights of the parties is a contract between them, temporary and provisional in its nature, but it settled the rights of the parties for the time being, "and until some action, proceeding, or motion is begun to change the status and some order is made thereon which has that effect, or until they become reconciled and resume marital

relations, in which event their mutual obligations are, for the time being at least, restored." (*London Guaranty etc. Co. v. Industrial Acc. Com.*, *supra*; *Olson v. Superior Court*, 175 Cal. 250, [1 A. L. R. 1589, 165 Pac. 706].)

Frank H. Gould died after the entry of the interlocutory decree, and within one month after its date, on February 14, 1918, an order was made in the superior court reciting the fact that an affidavit and consent of Nettie Gould, special administratrix of the estate of Frank H. Gould, deceased, had been filed, and E. B. Gould, special administrator of the estate was substituted and made a party plaintiff in the divorce action. On January 23, 1919, two days after the expiration of the year following the entry of the interlocutory decree, on the court's own motion, the final decree of divorce was entered. It embodied all the provisions of the interlocutory decree. On January 4, 1920, Nettie Gould moved in said court for an order setting aside the final decree of divorce, which motion remained under submission until the application for writ of prohibition was filed in this court and the alternative writ issued on March 13, 1920, more than one year after the entry of the final decree.

[5] The death of the husband terminated the marital relationship. The entry of the final decree thereafter had no effect upon the personal status of the surviving wife. (*Estate of Seiler*, *supra*; *Estate of Dargie*, 162 Cal. 51, [121 Pac. 320].) [6] Upon the death of the husband the rights of the wife under the laws of succession, if he died intestate, were fixed, unless those rights had theretofore been changed by contract with the husband. [7] Since no appeal was taken from the interlocutory decree and it was not set aside under section 473 of the Code of Civil Procedure, it became final and conclusive at the expiration of six months from its entry. It was a contract in regard to the community property. It is not necessary, nor would it be proper on this proceeding, to determine the legal effect of the contract evidenced by the interlocutory decree upon the property rights, if any, which vested in the wife on the death of the husband. It may be in a proper proceeding that it will be necessary for a court called upon to construe the interlocutory decree to determine whether the transfer of the property to the wife and her waiver of claim against

other property of the husband barred her from claiming in his estate any property under the laws of succession or whether the legal effect of the decree was simply to convert the portion of what had theretofore been community property into separate property of the husband in which, if he died intestate, it may appear that she has a heritable right. These statements are not to be understood as conveying any expression of opinion on the part of this court upon these matters, but as a basis for the conclusions reached in regard to the power of the trial court to enter the final decree or to set it aside.

Because this court on this proceeding cannot determine the legal effect of the interlocutory decree, it must, under well-established rules, indulge in every presumption in favor of the action of the trial court in entering the final decree, if, indeed, that action requires support by presumption. In the absence of a showing to the contrary, it must be presumed that the deeds, required to be executed within ten days after the interlocutory decree was made, were in fact executed, and that to forestall any doubt which might arise as to the vesting of title under such deeds or pursuant to the interlocutory decree, the final decree was entered. It does not seem necessary either to indulge in presumption upon this subject or to consider the reason which may have actuated the trial court to enter the final decree. The last clause of section 132 of the Civil Code, as amended in 1915, expressly provides that "the death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided." Since the marriage was not dissolved by the entry of the final decree, but by the death of the husband, and since the interlocutory decree established the property rights to the extent above indicated, it would appear on the one hand that the entry of the final decree accomplished nothing; on the other, that it injured nobody. While the law neither does nor requires idle things, it cannot be said that, when the legislature expressly reserved the power in the court to make the final decree, it was an idle act. Under the code section, it is concluded that the court had jurisdiction to enter the final judgment.

[8] The decree not having been set aside until more than one year had elapsed, the application for the writ of prohibi-

tion is based on the ground that to grant the pending motion is beyond the jurisdiction of the trial court. The respondents resist the granting of the writ solely on the ground that a judgment which appears on its face to have been made without jurisdiction is void, and may be attacked at any time. The conclusion that the trial court had jurisdiction to make the final decree disposes of the respondents' contention. The time having expired within which the trial court might have set aside the final decree under section 473 of the Code of Civil Procedure, on motion, it has lost jurisdiction to entertain such a motion. (*Byrne v. Hoag*, 116 Cal. 1, [47 Pac. 775].)

Let the peremptory writ of prohibition issue as prayed for by the petitioner.

All the Justices concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 21, 1920, and the following opinion then rendered thereon:

**THE COURT.**—The petition for rehearing is denied.

The opinion of the district court of appeal does not mention the decision given by the district court of appeal of the second district filed on October 30, 1919, in *Gloyd v. Superior Court*, 44 Cal. App. 39, [185 Pac. 995]. In that case a petition for a rehearing was denied by the supreme court. It is claimed in the present petition for rehearing that the opinion in this case is directly contrary to that in the Gloyd case. We think there is a clear distinction between them and one which takes away any apparent conflict. In the Gloyd case the interlocutory decree of divorce was a simple declaration that the husband, who was plaintiff, was entitled to a divorce. It did not purport to adjudicate property rights of any character. It was there held that in such a case, upon the death of the plaintiff during the ensuing year, the superior court lost jurisdiction to proceed further in the case, because the death dissolved the marriage and extinguished the pre-existing marriage status which formed the subject matter of the action, leaving nothing upon which the only final decree that could be made could operate.

[9] In the present case the interlocutory decree not only declared that the wife, who was cross-complainant, was entitled to a divorce, but also purported to confirm and provide for the performance of an agreement made by the husband and wife in open court dividing the community property between them and providing for the payment to the wife by the husband of a permanent monthly sum for her support. It was held that although the court may have lost jurisdiction to make a final decree, after the death of the husband, dissolving the marriage status, the property rights fixed by the agreement and confirmed by the interlocutory decree still remained in existence, and that as to them the court retained jurisdiction to enter the final decree in the manner specified in the interlocutory decree. Inasmuch as a husband and wife may, even if no divorce action is pending, make such contracts as they may choose respecting property (Civ. Code, sec. 159), such contracts, whether made in an action for divorce or otherwise, are valid, and the rights thereunder do not of necessity cease upon the death of either party. Consequently, the subject matter of the interlocutory decree, so far as such rights are concerned, was not extinguished by the death of Gould during the year succeeding the interlocutory decree and the court to that extent retained jurisdiction. This distinction is clearly indicated in the opinion of the district court and it was also intimated in the Gloyd case, although in that case it was not necessary to say what the result would be as to the property relations, inasmuch as none had been adjudicated by the interlocutory decree.

Shaw, J., Olney, J., Sloane, J., Lawlor, J., and Lennon, J., concurred.

Angellotti, C. J., and Wilbur, J., dissented from order denying hearing.

[Crim. No. 520. Third Appellate District.—April 23, 1920.]

In the Matter of the Application of F. O. JAMES for a  
Writ of Habeas Corpus.

- [1] **CRIMINAL LAW — FALSE PRETENSES — REPRESENTATIONS AS TO AMOUNT OF MONEY ON DEPOSIT — RELIANCE UPON.**—Where a purchaser obtains the property from the sellers upon the false representation that he has a given sum of money on deposit in a certain bank and his promise that by a certain day he will deposit such further sums as are necessary to meet the check which he then offers to them, and which they accept in payment and part with title to their property in reliance upon his representation as to the amount of money he then has on deposit, he is guilty of the crime of obtaining property by false representations.
- [2] **ID.—PRELIMINARY HEARING—REJECTION OF TESTIMONY—PROVINCE OF COMMITTING MAGISTRATE.**—On a preliminary hearing, the committing magistrate is clothed with authority to reject the testimony of the defendant and to believe that of the other witnesses, and he is not required to confine himself to the doctrine of reasonable doubt. It is sufficient if there exists sufficient cause to believe that the defendant is guilty.
- [3] **ID.—HOLDING TO ANSWER—PROOF REQUIRED.**—On a preliminary hearing of a defendant charged with obtaining property by false pretenses, it is not necessary, in order to hold the defendant to answer, that the committing magistrate shall be satisfied as to any fact beyond a reasonable doubt.

APPLICATION for a Writ of Habeas Corpus. Writ dismissed and petitioner remanded.

The facts are stated in the opinion of the court.

Walter F. Lynch for Petitioner.

Edward Van Vranken, District Attorney, and E. P. Foltz, Special Counsel, for Respondent.

PREWETT, P. J., *pro tem.*—Application for a writ of *habeas corpus* upon the ground that the petitioner is held

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1. Giving worthless check as constituting false pretense, notes, 8 Ann. Cas. 1069; 14 Ann. Cas. 510; Ann. Cas. 1916E, 736; 17 L. R. A. (N. S.) 244; 27 L. R. A. (N. S.) 1032; 52 L. R. A. (N. S.) 919.

to answer upon a criminal charge without probable cause. He is charged with obtaining sheep worth about sixteen thousand dollars upon the false pretense that, at the time of so doing, he had six thousand dollars on deposit in a certain bank. The petitioner denies making such a pretense, but admits that at the time he did not have said amount, or, in fact, any amount in excess of eighty cents, on deposit. He engaged to purchase the sheep from the owners. The sheep were counted out and loaded on the cars ready for delivery. He thereupon informed the owners that he had six thousand dollars on deposit and that by the following Saturday he would deposit such further sums as were necessary to meet the check which he then offered to them and which they accepted. They testified, and the court necessarily found, that they would not have parted with the title if they had not believed his statement that he had the six thousand dollars on deposit.

[1] (1) The petitioner insists that he should be discharged because he informed the sellers that he did not have sufficient funds in the bank to meet the check. It is quite true that he so informed them, but he is not charged with the representation that the check would be paid on presentation. Both he and they knew that it could not be paid before the following Saturday, and his own testimony shows that he knew it could not be paid in full even then. The false representation with which he stands charged is that he then and there had on deposit six thousand dollars. He took the sheep of these men, gave them a worthless check in payment, and within a few hours sold the sheep to other parties. That he may have intended, in fact, to meet the check in the future may be conceded, but this does not modify the fact, as found by the magistrate, that he obtained this considerable amount of property upon the false representation that he had a large sum on deposit.

[2] (2) The petitioner further insists that the false representation, in order to be criminal, must relate to an existing fact and that it cannot relate to an act to be performed in the future, as a mere promise to pay. This rule, as a mere statement of the law, is sound and is upheld in *People v. Green*, 22 Cal. App. 45, [133 Pac. 334]; but it has no application to the facts of this case as shown above. The magistrate was clothed with authority to reject the testimony



of the petitioner and to believe that of the other witnesses, nor is he required to confine himself to the doctrine of reasonable doubt. It is sufficient if there existed sufficient cause to believe that the petitioner is guilty. (*In re Vandiver*, 4 Cal. App. 653, [88 Pac. 993].)

The owners of the sheep testified that they relied, in parting with their title, upon the fact that the petitioner had six thousand dollars of ready money. The essence of the alleged crime arises out of the fact, not that he could not pay the check, but that he was short by six thousand dollars of his claimed assets.

It may well be, as insisted by the owners, that they were willing, in view of his deposit of six thousand dollars in cash, to look to the band of sheep and other properties for the remaining ten thousand.

[3] (3) Petitioner's claim that the evidence must show an intent to defraud beyond a reasonable doubt is answered by the case last cited, although the specific question as to *intent* did not arise in that case. However, section 872 of the Penal Code provides that a defendant must be held "if it *appears* from the examination, that a public offense has been committed." This language imports a degree of conviction far short of a belief beyond a reasonable doubt. *Ex parte Becker*, 86 Cal. 402, [25 Pac. 9], is in point. In that case the court discusses the degree of proof required before a committing magistrate and says: "Whether it is sufficient to convict beyond a reasonable doubt, it is the province of the jury to say, and ought not to be determined in advance on *habeas corpus*." The cases cited by petitioner in support of his claim do not deal with the measure of proof and are not in point. No authority has been brought to our attention, and we feel assured that none exists, holding that a committing magistrate must, in a case of the character under review, be satisfied as to any fact beyond a reasonable doubt.

We discover no adequate reason for disturbing the commitment. Writ dismissed and petitioner remanded.

Hart, J., and Burnett, J., concurred.

[Civ. No. 3358. First Appellate District, Division Two.—April 25, 1920.]

EDITH SHERMAN, Respondent, v. H. G. SHERMAN,  
Appellant.

- [1] **SEPARATE MAINTENANCE—ALLOWANCE OF COUNSEL FEES—APPEAL—PRESUMPTION.**—Where in an action for separate maintenance the husband permits the wife to recover judgment by default, he cannot, on appeal, attack that portion of the judgment allowing her a given sum as attorney's fees in said action on the theory that the services of counsel were completed before such allowance was made and, therefore, no award was necessary for the prosecution of the action. It will be presumed, in support of such judgment, that plaintiff proceeded in the usual and customary way by moving the court for an allowance of counsel fees necessary for the prosecution of the action and that such motion was granted by the court, as evidenced by its final judgment.
- [2] **ID.—PLEADING—ASSIGNMENT OF COMMUNITY PROPERTY TO WIFE—ERRONEOUS JUDGMENT.**—In an action for separate maintenance, where the allegations of the complaint relating to the community property are inserted for the purpose of procuring an injunction to restrain the defendant from disposing of such property and the judgment is by default, the court is not authorized to award the plaintiff the sum which she alleges is necessary for her support and maintenance, and which she prays that the court award her for that purpose, and in addition thereto assign her all the community property.

**APPEAL** from a judgment of the Superior Court of San Luis Obispo County. T. A. Norton, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

S. V. Wright for Appellant.

W. C. Carpenter and M. R. Van Wormer for Respondent.

**NOURSE, J.**—Plaintiff recovered judgment against defendant by default upon a complaint for separate maintenance charging him with adultery. The judgment awarded plaintiff the sum of seventy-five dollars per month for her support and maintenance in accordance with the allegations of the complaint, and in addition thereto allowed

her the sum of one hundred dollars as attorney's fees in said action and assigned to her all the community property of the respective parties. The appeal is taken from the portions of the judgment awarding attorney's fees and assigning the community property.

In respect to the matters complained of, the complaint alleges that the parties owned certain community property consisting of money in bank and an automobile, all of which it is alleged the defendant threatened to withdraw and dispose of for the purpose of leaving plaintiff without means of support. It is further alleged that the plaintiff will, "unless she has some maintenance from her said husband, be dependent upon her friends for support. That the sum of seventy-five dollars per month is a reasonable sum to be allowed this plaintiff for her support and maintenance." The prayer of the complaint asks for a reasonable sum as temporary and permanent alimony for the support of the plaintiff, for counsel fees and costs, and for general relief.

[1] In attacking that portion of the judgment allowing counsel fees, appellant relies upon *Lacey v. Lacey*, 108 Cal. 45, [40 Pac. 1056], which holds that the court is without power to make an allowance for counsel fees in the final judgment, for the reason that, the services of counsel having then been completed, no award is necessary "for the prosecution of the action," as contemplated by section 137 of the Civil Code. But the rule of that case does not apply here, because, this being a default judgment in which no findings were necessary and no bill of exceptions presented upon the appeal, all presumptions of regularity in the proceedings must be indulged in to support the judgment. Thus, it must be presumed for want of showing to the contrary that, before the commencement of the trial, plaintiff proceeded in the usual and customary way by moving the court for an allowance of counsel fees necessary for the prosecution of the action and that this motion was granted by the court, as evidenced by its final judgment.

[2] In assigning to plaintiff the entire community property of the parties, the court was bound by the allegations of plaintiff's complaint, which alone were admitted to be true by defendant's default. Clearly the allegations relating to the community property were inserted for the purpose of procuring an injunction to restrain defendant

from disposing of this property for the purpose of defeating the monthly award for maintenance for which plaintiff prayed. No notice was given to defendant that any disposition of the community property was sought. Plaintiff expressly alleged that defendant was drawing a salary of two hundred dollars per month; that the sum of seventy-five dollars per month was a reasonable sum for her support and maintenance, and prayed that the court award such reasonable sum for that purpose. Manifestly, under such allegations the court would not be justified in awarding a larger sum for the support and maintenance of the plaintiff without amendment or notice to the defendant. Under the prayer for general relief a court cannot give a plaintiff judgment by default which is not supported by the allegations of the complaint. Concededly, under the amendment of 1917 [Stats. 1917, p. 35] to section 137 of the Civil Code, the court may in an action for maintenance alone make the same disposition of the community property as could have been made if the marriage had been dissolved. But where under such section the community property is awarded to the plaintiff without dissolution of the marriage, such award can be sustained only upon the theory that it is necessary and reasonable for the maintenance and support of the wife or for the wife and children where such relief is sought. Because it is for that purpose alone that the action can be maintained, section 137 providing that "the court, in granting the wife permanent support and maintenance . . . shall make the same disposition of the community property, etc." The marriage state continues: the community is not dissolved; the parties may continue to live together and acquire and enjoy community property.

Where, therefore, the complaint expressly puts in issue the reasonableness of the sum necessary for support and maintenance by allegations that a specific sum is reasonable for such purposes, and admits, by failure to allege otherwise, that the community property is not necessary for such support and maintenance, the default of the defendant admits the issue as so presented and nothing more.

The judgment is modified by striking therefrom the portion thereof awarding to plaintiff the community property, and as so modified will stand affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2035. Third Appellate District—April 26, 1920.]

**CHARLES A. HUMPHREY, Doing Business, etc., Respondent, v. FARMERS UNION AND MILLING COMPANY (a Corporation), Appellant.**

- [1] **CONTRACTS—SALE OF BEANS—CONSTRUCTION OF TELEGRAMS—RIGHT OF INSPECTION.**—In this action to recover damages for the alleged breach of a contract in and by which it was claimed that defendant agreed to sell to plaintiff a specified quantity of re-cleaned pink beans at a given price, a fair construction of the telegrams passing between plaintiff and defendant showed that they met upon a definite proposition and agreement. The fact that to the telegram from plaintiff's bank guaranteeing payment of draft with bill of lading attached, as requested by defendant, there was added the words, "subject permission inspection on arrival," did not prevent a meeting of the minds of the parties, as the law would have added those words to the contract even if they had not been inserted in the telegram.
- [2] **ID.—TRANSMISSION OF REPLY—CONSUMMATION OF CONTRACT.**—After plaintiff's bank had telegraphed its guarantee of payment, as requested by defendant, although such telegram had not been delivered, and after all the terms and conditions imposed by defendant had been accepted, defendant could not prevent the consummation of the contract by telegraphing plaintiff that his wire was received too late and that the entire matter was canceled.
- [3] **ID.—PLACE OF PAYMENT—CONSTRUCTION OF TELEGRAMS.**—The telegram from defendant to plaintiff instructing the latter to have his bank wire guarantee of payment of draft with bill of lading attached and the telegram from such bank in response to such demand worded, "We guarantee payment your draft, bill of lading attached," showed that the understanding of the parties was that the goods were to be paid for at the point of destination, and not at the point of shipment, notwithstanding the telegram from defendant to plaintiff quoted the price of such goods "F. O. B." the point of shipment.
- [4] **ID.—BREACH—ACTION FOR DAMAGES—PRICE—EVIDENCE.**—Where, in such action for damages for breach of contract to sell certain beans, the only evidence before the court as to the amount the

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1. Acceptance of offer with condition that law would imply, note, 1 A. L. B. 1508.

2. Time when contract consisting of letters or telegrams showing offer and unconditional acceptance is complete, notes, 6 Ann. Cas. 378; 6 L. B. A. (N. S.) 1016; L. B. A. 1916A, 1302.

plaintiff would have had to pay for equivalent beans was the price at which equivalent beans could have been bought at the point of shipment, the trial court was justified in accepting that price as the price at which plaintiff could have bought equivalent beans in the market nearest the place of delivery.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge. Affirmed.

The facts are stated in the opinion of the court.

Nutter, Hancock & Rutherford for Appellant.

A. H. Ashley for Respondent.

ELLISON, P. J., *pro tem.*—Plaintiff brought this action to recover damages for the alleged breach of contract in and by which it was claimed that defendant agreed to sell to it eighty thousand pounds of recleaned pink beans at the price of \$6.35 per hundred pounds F. O. B. Stockton, California. After trial the court found that the contract was executed, as alleged in the complaint, and that the defendant neglected and refused to deliver the beans as therein contracted to be delivered to the damage of the plaintiff in the sum of \$550, and entered judgment against the defendant for that amount. The defendant appeals from the judgment.

The contract, if one was made, resulted from certain telegrams passing between the plaintiff and defendant.

For a reversal the defendant and appellant relies upon three propositions: First, that the telegrams did not constitute an agreement; second, that the seller was entitled to be paid at Stockton, and third, that if the place of delivery was Evansville, Indiana, damages should have been based upon the price at which respondent could have bought equivalent beans in markets nearest Evansville, Indiana, and not at Stockton.

[1] I. We are of opinion that a fair construction of the telegrams leads to the conclusion that the parties met upon a definite proposition and agreement. In the telegram of November 14, 1916, the defendant said: "Cannot sell at price you name. Can sell eighty thousand pounds pink \$6.35 F. O. B. Stockton. Railroad says cannot furnish empty cars promptly. The prospect of shipment getting through

unfavorable. Order subject delay and confirmation." To this telegram the plaintiff, on November 15th, replied as follows: "Answering telegram accept pink \$6.35. Must ship during November. Do the best you can." This was not an unconditional acceptance of the proposition made in the telegram of November 14th, above quoted. The defendant had stated in his telegram of November 14th, that the railroad could not furnish empty cars promptly and that the prospect of shipments getting through promptly was unfavorable, and that the plaintiff must order subject to delay and confirmation. The answer to this telegram was that the goods must be shipped during November, which was not agreeing to accept the beans subject to delay. On November 17th, the defendant, however, telegraphed as follows: "Eighty thousand pounds recleaned pink beans ready. Car obtainable. Have your bank wire guarantee payment draft with bill of lading." This was a statement by the defendant in effect that it could ship as requested by the plaintiff during the month of November, because it stated therein, "car obtainable." It was a statement that there would be no delay, and that if the beans were bought they could be loaded at once, but it contained a new proposition which had not been suggested before, namely, "have your bank guarantee payment draft with bill of lading." On November 18, 1916, the plaintiff's bank, the Citizens National Bank of Evansville, Indiana, wired the defendant as follows: "We guarantee payment your draft bill of lading attached, Evansville, commercial pink beans at \$6.35, subject permission inspection on arrival." This was a meeting of the minds of the parties upon the same terms and conditions, save and except that the last telegram referred to had in it these words, "subject permission inspection on arrival." The matter of delay in shipment had been eliminated, the request that the bank guarantee payment had been accepted, and all conditions imposed by defendant had been met, qualified by the added suggestion that the beans would be subject to inspection on arrival.

It is the claim of counsel for appellant that it never assented to the plaintiff's request that the beans should be shipped subject to inspection, but, as the learned judge of the trial court observed, the law would have added these

words to the contract even if they had not been inserted in the telegram.

Section 1771 of the Civil Code reads: "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." Section 1785 of the Civil Code reads: "On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a seasonable time, before accepting it; and may rescind the contract if the seller refuses to permit him to do so."

In the case of *Newmark & Co. v. Smith*, 26 Cal. App. 339, [149 Pac. 1064], it is said: "The purchaser under a contract of sale of a certain quantity of beans is entitled, in the absence of a waiver of the right, to inspect the property sold as a condition precedent to the making of payment, and the seller is not entitled upon the tender of delivery to refuse such inspection and demand payment, and for failure to make payment to declare the contract annulled."

We are of opinion that the telegrams passing between the parties resulted in a contract between them. [2] The defendant's telegram of November 18th, wherein it says, "wire received too late, entire matter is canceled," was sent after the Citizens National Bank had telegraphed its guarantee of payment of the draft and after all the terms and conditions imposed by defendant had been accepted, and was too late to prevent the consummation of the contract. The wire accepting defendant's offer took effect on its deposit at Evansville for transmission. (Civ. Code, secs. 1582, 1583.) It was deposited at Evansville, Indiana, before the defendant's telegram of November 18th was sent.

[3] II. Some discussion is indulged in upon the meaning of the expression, "F. O. B. Stockton," it being the claim of appellant that this expression not only meant that the goods were to be placed on the car by the seller without any expense to the buyer, but, also, that it meant that upon their being loaded ready for shipment the purchase price was then due and payable and at the place of shipment.

We deem it unnecessary to examine critically whether the expression F. O. B. includes not only loading, but the right to have payment at the place of loading, because even if the expression in general does mean both loading and payment, the parties can contract differently. The telegrams in this



case conclusively show that if a sale were made it was the understanding of the parties that the goods were not to be paid for in Stockton, but were to be paid for in Evansville, Indiana. The telegram of November 17, 1916, sent by the defendant, "Have your bank wire guarantee payment draft with bill of lading," was a clear expression by the defendant that payment was not expected until the goods were received in Indiana, together with the bill of lading, and the guarantee of the Citizens National Bank in response to the demand for the guarantee, "We guarantee payment your draft, bill of lading attached," could mean nothing else than that the bank guaranteed that when the bill of lading reached Evansville, together with the draft, that the same would be paid at that place, and not at Stockton.

[4] III. Lastly, it is claimed by appellant that if the place of delivery was to be Evansville, Indiana, damages should have been based upon the price at which respondent could have bought equivalent beans in the market nearest Evansville and not at Stockton, and this contention is predicated upon the provisions of section 3354 of the Civil Code, wherein, in substance, it is provided that in estimating damages the value of the property to a buyer deprived of its possession is deemed to be the price at which he might have bought the equivalent thing in the market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.

Respondent introduced evidence tending to show the price at which equivalent beans could have been bought at Stockton, and no evidence of the price at which they could have been bought at any other place was introduced by either party. There is nothing in the record to show that the beans could have been bought at any less price at any place nearer Evansville. The price at which the beans could have been bought at Stockton was the only evidence the court had before it as to the amount the plaintiff would have had to pay for equivalent beans. There is no evidence in the record, either on behalf of plaintiff or defendant, and none offered by the defendant, tending to show what the market price of such beans was at any place nearer Evansville than the city of Stockton. We think, under the circumstances,

that the court was justified in accepting the proved price at the city of Stockton as the price at which respondent could have bought equivalent beans. If there was any place nearer Evansville at which they could have been bought then the matter was entirely open for the defendant to make such proof. It made no attempt to do so. It sufficiently appears from the record that permitting the evidence of the market price of beans at Stockton instead of confining the proof to some unnamed place east of the Rocky Mountains was a benefit to the appellant instead of an injury. The fact that the plaintiff was buying beans at Stockton to be shipped to Indiana, and paying the transportation charges thereon, is presumptive evidence that the market price of beans was less in California than in Indiana, otherwise the plaintiff was unbusinesslike in buying them. The appellant is not entitled to complain of a ruling that resulted in a benefit to it and a smaller judgment than otherwise might have been obtained.

We think the judgment is right and should be affirmed, and it is so ordered.

Hart, J., and Burnett, J., concurred.

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[Civ. No. 3175. First Appellate District, Division One.—April 26, 1920.]

VINING B. STONER et al., Respondents, v. THE SECURITY TRUST COMPANY (a Corporation), et al., Appellants.

- [1] **APPEAL—REQUEST FOR REPORTER'S TRANSCRIPT—TIME—DISCRETION OF TRIAL COURT.**—Where a party dissatisfied with the judgment of the trial court gives notice of his intention to move for a new trial, and such proceeding is terminated by the expiration of the three months' period prescribed by section 660 of the Code of Civil Procedure, but notice of such termination is not given or waived, the trial court acts within its discretion in approving the reporter's transcript of the record, notwithstanding request therefor was not made within ten days after the termination of the new trial proceedings, no undue delay having been caused.

- [2] **PLEADING—SUIT TO DETERMINE ADVERSE CLAIM—CONSTRUCTION OF COMPLAINT.**—A suit in the nature of an action to quiet title, the specific object of which is to cancel two purported assignments of a note and mortgage, and for the recovery of the money collected by the assignees under them, may be regarded as a suit under section 1050 of the Code of Civil Procedure to determine "an adverse claim . . . for money, or property upon an alleged obligation."
- [3] **ID.—PARTIES—SUIT BY DISTRIBUTEES.**—A final decree of distribution in the estate of the deceased payee named in such note and mortgage having been entered, the absolute right and title thereto was vested in the distributees, and they had the right to bring an action thereon.
- [4] **ID.—ASSIGNMENT OF NOTE AND MORTGAGE—COLLATERAL SECURITY—EVIDENCE—FINDING.**—In this action to recover a note and mortgage, and certain sums of money alleged to have been collected thereon, the evidence was sufficient to sustain the finding of the trial court that the assignment from plaintiffs' predecessor to certain of the defendants was given as collateral security for money advanced, and that they were taken by them as such and not by way of absolute ownership for an adequate consideration.
- [5] **PROMISSORY NOTE—SECURED BY MORTGAGE—NEGOTIABILITY.**—A promissory note, secured by a mortgage on land, both being executed as parts of the same transaction, and containing a default and option clause, is not negotiable.
- [6] **ID.—PLEDGE—APPARENT OWNERSHIP—ESTOPPEL.**—The general rule that one in possession of personal property can transfer to another, by pledge or sale, no greater interest in the property than he himself has, is subject to the exception that where the owner of the property clothes another with the apparent title to, or power of disposition over, it and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterward asserting his title.
- [7] **ID.—BONA FIDE PURCHASER—NEGLIGENCE OF OWNER—PROXIMATE CAUSE OF DECEIT.**—A *bona fide* purchaser of a non-negotiable chose in action, from one to whom the owner assigned apparent absolute ownership, may obtain a valid title as against such owner, although the assignee may not be the true owner; but if the purchaser from one who has not the title, and has no real authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit.
- [8] **ID.—EQUITABLE DEFENSE—PLEADING AND PROOF.**—In an action to recover a note and mortgage and certain sums of money alleged

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5. What is negotiable note, notes, 5 Ann. Cas. 152; Ann. Cas. 1912D, 4; Ann. Cas. 1916C, 503; 35 L. R. A. 536.

to have been collected thereon, if a defendant intends to interpose the equitable grounds of estoppel, it is incumbent upon him to specially plead, and to prove, the facts constituting such defense.

[9] FINDINGS—FORM OF.—Findings are not required to be in a particular form, so long as they properly dispose of the material matters at issue.

APPEAL from a judgment of the Superior Court of Kern County. K. S. Mahon, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. J. Emmons for Appellants.

Charles H. Mattingly for Respondents.

WASTE, P. J.—The plaintiffs, children and only heirs at law of Vandoren Stoner, claiming to be the owners of a certain note and mortgage, executed to the decedent during his lifetime, brought this action to recover the same from the defendants, and for certain sums of money alleged to have been collected thereon. Defendants answered, alleging ownership of the note and mortgage in defendant Katze, by an absolute and *bona fide* assignment, and that the defendant, Security Trust Company, held the same as collateral security for certain loans made to defendants Katze and Coyne. The lower court gave judgment for plaintiffs, from which the defendants appeal, seeking a review of the proceedings upon their motion for a new trial.

During the life of Vandoren Stoner, L. P. Keester and M. P. Smith executed and delivered to him their promissory note for \$3,500, payable in seven annual installments of \$500 each, and secured by a second mortgage upon real property. The note provided that should default be made in payment of any installment of interest or principal when due, the whole sum of principal and interest should immediately become due at the option of the holder. By an instrument in writing, Stoner assigned and transferred the note and mortgage to defendant Katze, the assignment being absolute in form, and purporting to be "in consideration of the sum of Ten Dollars." This transfer, the trial court found, was made without any consideration, except the sum of \$710 loaned by Katze to Stoner, and that the assignment

was made as collateral security for the repayment of that amount, and for no other purpose. Stoner gave no authority or direction in reference to the hypothecation, or other disposition of the note or mortgage.

Shortly after taking the assignment, Katze borrowed and received of the defendant Security Trust Company the sum of \$750, giving his note for the amount. As collateral security for the payment of that note he transferred the Keester and Smith note and mortgage, for \$3,500, to the trust company, the assignment, by apt reference, being made to secure the particular note. At that time the bank had no knowledge, so the trial court found, that Katze held the assignment from Stoner merely as collateral security. Some time later Katze and Coyne, two of the defendants, borrowed from the bank an additional \$500, giving their joint note therefor. Three days later, on May 20, 1913, Vandoren Stoner died. On July 28th, following, Katze, by an instrument in writing, executed a general assignment of the \$3,500 note, and mortgage, to the bank. The reason for this transaction, as explained by the bank's clerk, while on the stand, was that, having only a specific assignment to secure the \$750 note, executed by Katze, and having advanced an additional amount to Katze and Coyne on their joint note, the bank, on July 28th, demanded the new assignment be "given for the money that had been previously advanced."

On the eighth day of December following, Katze and Coyne executed a new note to the bank for \$2,600. The previously executed notes for \$750 and \$500, respectively, were thereupon treated as "paid by renewal" and the difference between their total and \$2,600, the amount of the renewal note, or \$1,350, was credited upon the books of the trust company to the account of defendant Coyne. No new, or further assignment was taken by the bank, but on that day it caused the general assignment of July 28th to be recorded, and continued to hold it "as security that they [Katze and Coyne] would pay that \$2,600." The limited assignment of March 12th was not recorded.

There is some evidence that the bank had knowledge of the limited interest Katze had in the \$3,500 note and mortgage, before he hypothecated them for his \$750 loan. Katze so stated in his letter to the attorney for the Stoner estate. However, the court found to the contrary. Aside from this

bit of evidence it does not clearly appear that the bank knew of the claim of the estate before the renewal transaction in December. The testimony on the question is conflicting, and the court made no finding in that regard. There is nothing in the record, however, to indicate that the bank made inquiry at any time, during the entire transaction, to inform itself on the point. It took the special and general assignments without any investigation as to the real interest of defendant Katze, in each case for money about to be, or already, advanced, and, apparently by tacit consent, continued to hold the note and mortgage as collateral security for the repayment by Katze and Coyne of the \$2,600, to which sum their indebtedness was enlarged by the renewal transaction.

Due administration of the estate of Vandoren Stoner was had, of which the bank had notice. As has been made to appear by diminution of the record, by the final decree of distribution, the note and mortgage for \$3,500, executed by Smith and Keester, were distributed to these plaintiffs.

The defendant, Security Trust Company, in its answer admits having collected, and appropriated to its own use, the first two installments of \$500 each, upon the \$3,500 note and mortgage, together with the interest.

The lower court decided that plaintiffs are the owners of the note and mortgage and entitled to recover the installments of principal and interest collected by the Security Trust Company, less the sum of \$710 and interest, representing the amount loaned by defendant Katze to Vandoren Stoner, as consideration for the original assignment by Stoner to him. By the judgment this sum was directed to be deducted from the amount collected by the bank, and to be applied by it as a credit on the amount of its claim against defendant Katze. The assignment by defendant Katze to the Security Trust Company was set aside, and it was ordered to assign and deliver the note and mortgage to plaintiffs.

[1] Respondents make a preliminary objection to a consideration of the evidence in the case, upon the ground that the appellants did not file their notice with the clerk below, requesting a reporter's transcript of the record, within time. That notice must be filed within ten days after notice of entry of the judgment, order, or decree, or if a proceeding

on motion for a new trial be pending, within ten days after notice of decision denying said motion, *or of other termination thereof*. (Code Civ. Proc., sec. 953a.) (The italics are ours.) The defendants gave notice of their intention to move for a new trial. The motion was not brought on for hearing, nor was any action taken by the trial court in the matter, within three months after the service of notice of the entry of the judgment, the effect of all of which was a denial of the motion without further order, and amounting to a termination of the proceedings on the motion for a new trial. (Code Civ. Proc., sec. 660.) No notice of this "other termination thereof" was given, and there is nothing in the record which indicates that appellants either waived such notification or acted in the proceedings of the cause as if they had received formal and binding notice. They caused no undue delay and the trial court acted well within its discretion in approving the transcript when it was presented.

Appellants contend that the complaint fails to state a cause of action in that it is based upon an attempt to quiet title to personal property, not provided for by sections 738 or 1050 of the Code of Civil Procedure, and for the further reason that the heirs of the decedent may not maintain the action. [2] The specific object of the suit was to cancel the two purported assignments of the note and mortgage, and for the recovery of the money collected by the assignees under them. It may be regarded as a suit under section 1050 of the Code of Civil Procedure to determine "an adverse claim . . . for money or property upon an alleged obligation." (*Hoffman v. Kirby*, 136 Cal. 26, 29, [68 Pac. 321].) [3] As to the other objection, a decree of final distribution, in the estate of Vandoren Stoner, was duly entered, before the action was brought, the effect of which was to vest the absolute right and title to the note and mortgage in the distributees, who, as plaintiffs, brought this action. (*Garraud's Estate*, 36 Cal. 277, 279, 280.)

[4] The appellants urge as other grounds for reversal the alleged insufficiency of the evidence to support certain findings, and that the findings themselves do not warrant the judgment. That the note and mortgage were assigned by Stoner to Katze, as security for money advanced, is amply supported by the testimony of a number of witnesses as to

the admissions made to them by Katze that such was the fact, by his acknowledgment that such was the case contained in his letter to the attorney for the estate of Stoner, and by his own testimony concerning the transaction. His acts and relations with Stoner after the purported assignment, as related by himself, particularly under cross-examination by plaintiff's counsel, and by the court, were inconsistent with his theory of an absolute assignment. His own denials only raised a conflict in the evidence, which the trial court has determined against him. The claim of the defendant Coyne was also shown by the evidence to be based upon money alleged to be owed to him by the decedent Stoner. His attitude in the matter has much the appearance of being suggested by an effort to collect the amount out of the proceeds of the \$3,500 note and mortgage, without the necessity of presenting a claim against Stoner's estate. The finding that the note and second mortgage for \$3,500 were worth their face value is supported by the evidence that the land covered by the mortgage was worth \$8,000, encumbered only by a first mortgage for \$1,500, and by testimony that the makers of the note were considered financially good for the amount.

[5] The assignment by Stoner to Katze was for collateral security only. The note for \$3,500, secured as it was by a mortgage on land, both being executed as parts of the same transaction, and containing the default and option clause, was not negotiable. (*Meyer v. Weber*, 133 Cal. 681, 685, [65 Pac. 1110]; *National Hardware Co. v. Sherwood*, 165 Cal. 1, 5-6, [130 Pac. 881].) What, then, is the position of the defendant Security Trust Company under these circumstances? [6] If the bank has any right which it can assert other than the right to offset its claim against defendant Katze to the extent of \$710, owed by the decedent Stoner to Katze, and which the court allowed and provided for in its judgment, it must be because it obtained the note and mortgage under such circumstances as would estop Stoner, and those claiming under or through him, from asserting their claim to its prejudice, for it is the general rule that one in possession of personal property can transfer to another, by pledge or sale, no greater interest in the property than he has himself. There is an exception to this rule, where the owner of the property clothes another with the



apparent title to, or power of disposition over, it and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner being in such case held estopped from afterward asserting his title. (*Chase v. Whitmore*, 68 Cal. 545, 547, [9 Pac. 942]; *Shafer v. Lacy*, 121 Cal. 574, 578, [54 Pac. 72]; *Shirey v. All Night and Day Bank*, 166 Cal. 50, 55, [134 Pac. 1001]; *Fowles v. National Bank of California*, 167 Cal. 653, 659, [140 Pac. 271].) [7] Under this principle, a *bona fide* purchaser of a non-negotiable chose in action, from one to whom the owner assigned apparent absolute ownership, may obtain a valid title as against such owner, although the assignee may not be the true owner. This conclusion is reached by the application of the doctrine of estoppel, and the modification of the general rule relating to the transfer of personal property is placed upon that ground. (*Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, [14 Am. Rep. 173]; 2 R. C. L., p. 632; *Fairbanks v. Sargent*, 104 N. Y. 108, 117, [58 Am. Rep. 490, 6 L. R. A. 475, 9 N. E. 870].) But if the purchaser from one who has not the title, and has no real authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit. (*Barstow v. Savage Mining Co.*, 64 Cal. 388, 393, [49 Am. Rep. 705, 1 Pac. 349].) The burden is upon the one seeking to invoke the exception to the general rule. (*Woodsum v. Cole*, 69 Cal. 142, 145, [10 Pac. 331]; *Kenniff v. Caulfield*, 140 Cal. 34, 45, [73 Pac. 803].)

[8] In the instant case the defendant bank appears to have relied solely upon a legal defense to the action. It contented itself with making common cause with the other defendants in asserting that the assignment by the decedent Stoner to Katze was absolute and for adequate consideration. If it intended to interpose the equitable grounds of estoppel, it was incumbent upon it to specially plead the facts constituting such defense. (*Clarke v. Huber*, 25 Cal. 593; *Chapman v. Hughes*, 134 Cal. 641, 646, [58 Pac. 298, 60 Pac. 974, 66 Pac. 982].) Not having so pleaded, it could not be now considered (*Burk v. City of Santa Cruz*, 163 Cal. 807, 811, [127 Pac. 154]), even though the appellant was now attempting to avail himself of it, which it is not. By neither averment nor proof has it brought itself within the excep-

tion to the general rule. Such action on its part seems to be entirely consonant with its chosen line of defense. We feel that it was satisfied to abide by the fate of its codefendants. We are, therefore, constrained to hold that its interest in the hypothecated note and mortgage was measured by the extent of the advances made to Stoner by Katze, which the trial court has found, on evidence which we must admit is somewhat confusing, to be the sum of \$710.

In view of our conclusion in the matter, the point made that certain findings may appear to be immaterial need not be further considered. A large part of this objection arises, no doubt, because the lower court's conclusions do not harmonize with the theory of the appellants. [9] Findings are not required to be in any particular form, so long as they properly dispose of the material matters at issue. (*Millard v. Supreme Council*, 81 Cal. 340, 342, [22 Pac. 864]; *Mott v. Ewing*, 90 Cal. 231, 235, [27 Pac. 194].)

We find nothing in the record which would have justified the trial court in granting a new trial. The judgment is affirmed.

Richards, J., and Knight, J., *pro tem.*, concurred.

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[Crim. No. 702. Second Appellate District, Division One.—April 27, 1920.]

THE PEOPLE, Respondent, v. JOE E. COTA, Appellant.

[1] CRIMINAL LAW—BURGLARY—PROOF OF CORPUS DELICTI—ADMISSION OF CONFESSION.—In this prosecution for the crime of burglary, the testimony of the caretaker of the premises that the crime was committed between the hours of 8 o'clock P. M. of a certain day and shortly before 8 o'clock A. M. of the next day, at which latter time he discovered the facts and, following tracks from the building, located in a hedge of trees property similar to that which was stolen, the testimony of the sheriff that he stationed himself near the cached property found by the caretaker and arrested the defendant when he appeared there the following night with a sack under his coat, and the testimony of another witness that between the hours of 10 and 11 o'clock on the night the crime was committed the defendant, accompanied by another party, came to his

house and left certain property, which property was identified as being similar to that which was stolen, and the inferences fairly deducible therefrom, were sufficient to establish beyond a reasonable doubt that the offense was committed in the night-time, and, therefore, the court did not err in admitting evidence of the defendant's confession.

- [2] **ID.—BURGLARY DEFINED — INSTRUCTIONS — EVIDENCE.**—In such prosecution the defendant was not prejudiced by an instruction, in the language of section 459 of the Penal Code, that "Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary," where no evidence other than that pertaining to the offense charged in the information was offered.

**APPEAL** from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. P. Butcher, Jr., for Appellant.

U. S. Webb, Attorney-General, and Arthur Keetch, Deputy Attorney-General, for Respondent.

**SHAW, J.**—Defendant appeals from a judgment of conviction had upon an information wherein he was charged specifically with the commission of the crime of burglary in the first degree.

The subject of the theft was a quantity of liquor, consisting of wine and whisky contained in bottles and demi-johns, taken from the wine cellar, the door of which was locked, which cellar was situated in the basement of a residence owned by Mr. Gould, entry to which was had by the breaking of a window and the lock on the door of the wine cellar.

[1] One of the essential elements of the crime charged is that it was committed in the night-time, which, in this case, was the time between the hour of sunset at 4:54 P. M. on December 2d, and the hour of sunrise at 6:46 A. M. on December 3d.

Evidence of statements made by the defendant wherein he admitted his participation in the crime, which, he stated, was committed between 10 and 11 o'clock P. M. on the night of December 2d, was received over defendant's objection,

and this ruling is assigned as error. His contention is that the reception thereof was not preceded by proof of the *corpus delicti*, namely, that the crime was committed in the night-time, and without which the evidence was not admissible. (*People v. Vertrees*, 169 Cal. 404, [146 Pac. 890]; *People v. Tapia*, 131 Cal. 651, [63 Pac. 1001]; *Gray v. Commonwealth*, 101 Pa. St. 380, [47 Am. Rep. 733].) Conceding that it devolved upon the People to show by independent evidence and beyond a reasonable doubt that the specific crime charged was committed (*People v. Smith*, 136 Cal. 207, [68 Pac. 702]), as a condition of admitting the confession in evidence, we think such fact was established. It was made to appear by testimony of the caretaker of the place, who lived in a house about one hundred yards from the Gould residence, that the crime was committed between the hours of 8 o'clock P. M., December 2d, and shortly before 8 o'clock A. M., December 3d, at which latter time he discovered the broken window to the basement, together with the fact of the theft, and following tracks leading from the window he found in a hedge of trees a number of bottles containing liquor, which bottles were similar to those contained in the cellar. On the night of December 3d the sheriff stationed himself near the cached liquor, and about 10:30 o'clock defendant appeared with a sack under his coat, when he was arrested. It also appeared from the testimony of another witness that between 10 and 11 o'clock on the night of December 2d the defendant, accompanied by another party, came to his house and left some demijohns of whisky, which demijohns were identified as being similar to those which the caretaker had assisted in taking to the basement of the residence; in addition to which the caretaker testified in direct terms that the entry was made and the goods taken between sunset and sunrise; and conceding that his evidence upon this point was shaken by his testimony on cross-examination to the effect that he was not out of his house, some hundred yards from the residence so entered, between the hours of 8 o'clock P. M. and 8 o'clock A. M. on said days, and there was an interval of an hour and a quarter of daylight, nevertheless, we think the evidence and the inferences fairly deducible therefrom were sufficient to establish beyond a reasonable doubt that the offense was committed as charged. (*People v. Stevens*, 68

Cal. 113, [8 Pac. 712]; *People v. Schafer*, 161 Cal. 573, [119 Pac. 920].) This being true, it follows that the court did not err in admitting the evidence of defendant's confession, which, if true, shows conclusively that he was guilty of the commission of the crime.

[2] In defining burglary, the court, in its instruction, used the language of section 459 of the Penal Code, that "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary." Appellant argues that by this instruction notwithstanding the charge in the information was that of entering the house with the intent to commit larceny only, the jury was authorized to convict defendant if they found he had entered the house with the intent to commit any felony, and hence it was error. (*People v. Mulkey*, 65 Cal. 501, [4 Pac. 507]; *People v. Young*, 65 Cal. 225, [3 Pac. 813]; *Williams v. State*, 53 Tex. Civ. App. 2, [108 S. W. 371].) Conceding this to be true, nevertheless, for the reason that no evidence other than that pertaining to the offense charged was offered, defendant could not have been prejudiced by reason of the error.

The court instructed the jury that "the information charges burglary in the first degree, and before you can convict the defendant you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that he is guilty as charged in the information, to wit, of burglary in the first degree, committed at the place charged in the information and between sunset on December 2, 1919, and sunrise on December 3, 1919. You cannot in this case render a verdict of burglary in the second degree." It would be difficult to conceive of an instruction prepared with greater care, and having for its purpose the protection of defendant's rights, than the one quoted; and it is impossible to understand, even in the light of appellant's argument, any ground whatsoever for the attack thereon.

Other alleged errors predicated upon rulings of the court in permitting the district attorney, over defendant's objection, to ask leading questions of one witness, and its rulings in admitting hearsay testimony as to ownership of the house where the crime was committed, and also error predicated

upon assignments of misconduct of the district attorney in his argument of the case to the jury, are not of sufficient merit to warrant consideration.

As a whole, the character of the evidence presented by the record is such that the jury could not properly have reached a verdict other than that rendered, and no errors are shown which could possibly have resulted in a miscarriage of justice. (Sec. 4½, art. VI, Const.)

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

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[Crim. No. 517. Third Appellate District.—April 27, 1920.]

**In the Matter of the Application of GEORGE DE MARTINI  
for a Writ of Habeas Corpus.**

[1] **CRIMINAL LAW—VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR—  
VIOLATION OF OATH—PERJURY.**—The oath of a prospective juror on his *voir dire* examination binds him, under the pains and penalties of perjury, to truthfully answer the questions that may be propounded to him by either court or counsel.

**APPLICATION for a Writ of Habeas Corpus.** Writ denied and petitioner remanded.

The facts are stated in the opinion of the court.

E. R. Vaughn and George E. Foote for Petitioner.

Hugh B. Bradford, District Attorney, and J. R. Hughes, Assistant District Attorney, for Respondent.

PLUMMER, P. J., *pro tem.*—On the seventeenth day of March, 1920, an indictment was returned in the superior court of the state of California, in and for the county of Sacramento, charging the petitioner with the crime of perjury, alleged to have been committed by said petitioner in said court on or about the twelfth day of January, 1920, upon his examination on *voir dire* as to his competency to

serve as a juror in a certain cause then and there pending. Upon such examination the petitioner was asked the following questions and gave the following answers, to wit: "Q. And if you are chosen as a juror in this case, you will try this case solely upon the evidence produced in court, and the instructions of the court? A. Yes, sir. Q. Nothing outside of the case, that is, outside of the evidence and the instructions of the court, will enter into your deliberations when you go into the jury-room? A. No, sir."

The indictment then sets forth allegations such as are required in charging the crime of perjury; the falsity of the answers, and the knowledge thereof of the petitioner, etc.

[1] The petitioner contends that the indictment charges no public offense, and that perjury cannot be predicated upon false statements given by a prospective juror or upon his *voir dire* examination. The argument in support of this contention is based upon the cases having to do with promissory oaths.

By section 118 of the Penal Code it is provided that "every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person in any of the cases in which such an oath may be administered by law, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury."

The petitioner in this case had administered to him an oath in substance as follows: "That you will true answers make to such questions as may be propounded to you by court or counsel touching your competency to act as a trial juror in the cause now pending," etc. This oath is, in substance, if not in form, the same oath that is administered to a witness testifying in either civil or criminal causes pending in any of the courts of the state. The crime charged to have been committed by the petitioner was not after having been "sworn to well and truly try the cause and a true verdict render according to the law and the evidence," etc., but when he was sworn to tell the truth. The misapprehension in this case arises from the failure to draw the distinction between the two oaths: The oath of the juror to well and truly try a cause is admittedly promissory in its nature, but the oath of a prospective juror on his *voir dire* examination binds him, under the pains and penalties of perjury,

to truthfully answer the questions that may be propounded to him by either court or counsel.

The language of section 118 of the Penal Code is certainly broad enough to include the offense of perjury when committed by a prospective juror upon his *voir dire* examination, and to hold otherwise would certainly be to open the door wide to all form of collusion in the selection of jurors, if false answers knowingly and corruptly made under such circumstances can be given with impunity.

In *Hilliard v. State*, 82 Tenn. 648, a prospective juror was held to have committed perjury upon giving a false answer to the following question: "Have you formed or expressed any opinion as to the guilt or innocence of the defendant?" In that case the oath administered upon *voir dire* was practically the same as administered in the case now under consideration.

In *State v. Howard*, 63 Ind. 502, it was held that an indictment for perjury might be predicated upon alleged false swearing given by the defendant while being examined under oath as to his competency to sit as a juror on the trial of a cause.

To the same effect is the case of *Finch v. United States*, 1 Okl. 396, [33 Pac. 638].

It does not appear that this question has heretofore been expressly decided by the supreme or appellate courts of this state.

In the case of *Ex parte Meyer*, 107 Cal. 17, [40 Pac. 953], the petitioner was held to answer upon a charge of having falsified his oath under similar circumstances, but the question of whether perjury could or could not be so committed was not decided. The petitioner was discharged for other reasons.

The contention that the crime charged is difficult or impossible of proof does not seem to require any consideration upon this proceeding.

Being of the opinion that the charge of perjury may be based upon false swearing by a prospective juror upon his *voir dire* examination, and that for the purposes of this petition the indictment herein is in all other respects sufficient, it follows that the writ prayed for herein should be denied, and it is so ordered, and the petitioner remanded.

Burnett, J., and Hart, J., concurred.



[Civ. No. 2820. Second Appellate District, Division One.—April 28, 1920.]

**CORA DUNTON et al., Appellants, v. IDA MAY TANIGOSHI et al., Respondents.**

- [1] **DEFAULT—NOTICE OF MOTION TO SET ASIDE—DAY OF HEARING—MISSTATEMENT.**—Where a notice of motion to set aside a default definitely designates the day of the month and year on which the motion will be made, a misstatement of the particular day of the week on which it will be made should be disregarded.
- [2] **ID.—POSTPONEMENT OF HEARING—DUTY OF OPPOSITE PARTY.**—A notice that such a motion will be heard at a given hour of the day is sufficient to bring the opposite party into court at that time, and if there is any postponement of the hearing under rule of court, he is bound to ascertain that fact.

**APPEAL** from an order of the Superior Court of Los Angeles County granting a motion to set aside a default. Grant Jackson, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Stewart & Stewart for Appellants.

L. B. Stanton for Respondents.

**JAMES, J.**—After the plaintiffs herein had caused judgment by default to be entered against the defendants, defendants presented a motion to set aside the same and to be allowed to file an answer. The motion was granted. Plaintiffs appeal from the order.

[1] The main point presented is as to the sufficiency of the notice as given by the defendants of their motion to set aside the default and the judgment entered thereon. The notice specified that the motion would be made on "Wednesday, the 1st day of July, 1918, at ten o'clock in the forenoon of said day." As a matter of fact, Monday was the first day of July, and not Wednesday, and the motion was heard on Monday. Plaintiffs made no appearance at the hearing of the motion, and they contend now that the notice of motion was of no effect because it was indefinite as to the time when the motion would be presented. We think that

the notice was a good notice bringing on the motion for the first day of July, and that the word "Wednesday" should be disregarded. The mention of the particular day of the week was not necessary to the notice, and a misstatement of that day, where the notice definitely designated "the 1st day of July, 1918," was, to our minds, immaterial.

[2] The further point is presented that because the superior court by an arrangement of its law and motion calendar segregated causes and that under such manner of segregation the clerk placed the motion on the calendar for 11 A. M., instead of 10 A. M., as designated in the notice, made its action on the motion of no effect. There appears to be no merit in that contention. The segregation referred to was made by the clerk after the notice of motion was given, and the rule did not require attorneys to ascertain in advance the particular hour of the day at which motions noticed to be heard would be called. A notice that a motion would be heard at 10 A. M. would be sufficient notice to bring the opposite party into court at that time, and if there was any postponement of the hearing under rule of court, he would be bound to ascertain that fact. No question is made at all as to the sufficiency of the showing upon the application to set aside the default and judgment.

The order is affirmed.

Conrey, P. J., and Shaw, J., concurred.

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[Civ. No. 2802. Second Appellate District, Division One.—April 28, 1920.]

THE PEOPLE, Respondent, v. CITY OF SAN BERNARDINO (a Municipal Corporation), Appellant.

[1] STATE POISON ACT—DISPOSITION OF FINES—LAW APPLICABLE.—The state Poison Act, being a general statute, enacted by the legislature, and the offenses defined therein being state offenses—in other words, offenses which, in their commission or punishment, are not limited to the confines of any municipality—provision therein relating to the disposition of fines collected under its provisions and not the provision contained in a freeholders' charter of a given municipality, is of superior effect and must control.

- [2] **ID.—SUFFICIENCY OF TITLE.**—An act entitled, “An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof,” satisfies the requirement of the constitution as to its title.
- [3] **ID.—ACTION TO RECOVER PERCENTAGE OF FINES — NATURE OF — STATUTE OF LIMITATIONS.**—An action by the state against a city to recover seventy-five per cent of certain fines imposed upon defendants in the police courts of that city after conviction therein of violations of the state Poison Act is one upon a liability created by statute, as to which the three-year statute of limitations is applicable.

**APPEAL** from a judgment of the Superior Court of San Bernardino County. H. T. Dewhirst, Judge. Affirmed.

The facts are stated in the opinion of the court.

William Guthrie for Appellant.

U. S. Webb, Attorney-General, Schweitzer & Hutton and G. B. Blanckenburg for Respondent.

**JAMES, J.**—Plaintiff sued to recover seventy-five per cent of certain fines imposed upon defendants in the police court of the city of San Bernardino after conviction of violations of the state Poison Act. Judgment was entered agreeable to the prayer of the complaint and defendant appealed therefrom. The appeal is presented on the judgment-roll.

[1] The main contention of appellant is that by reason of provisions of the freeholders’ charter, under which defendant city is organized, all fines collected in the police court are required to be paid into the city treasury for the benefit of the city; that the provisions of the state Poison Act in conflict therewith are null and void. This argument is based upon the assumption that, in the prosecutions mentioned, the collection of fines and the disposition thereof is a municipal affair, and that the charter provisions affecting the matter are, therefore, of conclusive effect. (Secs. 6 and 8, art. XI, Const.) The Poison Act is a general statute, enacted by the legislature (see Act 2724, Deering’s Gen. Laws), and the offenses defined therein may be designated as state offenses—in other words, offenses which, in their commission, are not limited to the confines of

any municipality. The entire subject matter of the act relates in no manner to "municipal affairs." Upon the general subject of what is included within that term, see *Fragley v. Phelan*, 126 Cal. 383, [58 Pac. 923]. In *Roberts v. Police Court*, 148 Cal. 131, [82 Pac. 838], it was said, in the concurring opinion: "The jurisdiction of offenses defined by state law must be regulated by general state law, and such regulations cannot be altered or qualified by any provision of a freeholders' charter. The trial and punishment of offenses defined by the laws of the state is not a municipal affair. Jurisdiction of such offenses may be conferred upon police courts by act of the legislature, but cannot be conferred by special freeholders' charter, and certainly not in a manner which will impair the operation of general laws." In *Fleming v. Hance*, 153 Cal. 162, [94 Pac. 620], it was held that the matter of the prosecution of state offenses in police courts was not a municipal affair, and in touching upon the question of the disposition of fines collected in such cases, the court said: "The legislature was not bound to turn this source of revenue over to the city; but its doing so did not authorize it to compel the city to pay expenses not properly chargeable to it." If the general statute had been silent upon the subject of the disposition of fines collected under its provisions, then it might, with reason, be held that the charter provision giving general direction as to the disposition of all fines collected in the police court would be operative. The statute, however, designates specifically that the fines shall be apportioned, twenty-five per cent to the city and seventy-five per cent to the state board of pharmacy; and this provision relating, as it does, to a state affair, one in which the people generally are interested, is of superior effect and must control.

[2] The second proposition made by appellant is that the title of the poison act does not satisfy the requirement of the constitution, in that it is not sufficiently expressive of the contents of the act. The act is entitled, "An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof," and we think is sufficient, under the decisions made in *Ex parte Liddell*, 93 Cal. 633, [29 Pac. 251], and *Matter of Yun Quong*, 159 Cal. 508, [Ann. Cas. 1912C, 969, 114 Pac. 835].

[3] Appellant's last point is that the demand for recovery of certain fines was barred by the provisions of section 339 of the Code of Civil Procedure—the two-year statute. Counsel's position as to this defense would be correct if the two-year statute applied. However, we are of the opinion that the three-year statute is the one to be considered (Code Civ. Proc., sec. 338), and that the action is one upon a liability created by statute, rather than upon the obligation specified in section 339.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

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[Civ. No. 3442. First Appellate District, Division Two.—April 28, 1920.]

MARGARET CATHERINE DOLAN, Petitioner, v.  
SUPERIOR COURT OF THE CITY AND COUNTY  
OF SAN FRANCISCO et al., Respondents.

- [1] JUDGMENTS—MOTION TO VACATE—GROUNDS.—A motion to vacate a judgment on the ground that the conclusions of law are not consistent with, nor supported by, the findings is permissible under sections 663 and 663a of the Code of Civil Procedure.
- [2] ID.—ENTRY THROUGH INADVERTENCE—RELIEF.—Relief from judgments entered through inadvertence, surprise, or excusable neglect must be sought by a motion made under section 473 of the Code of Civil Procedure.
- [3] ID.—OMISSION TO ENTER ORDER—ENTRY NUNC PRO TUNC.—Where an order is made submitting a motion for a new trial but, through inadvertence, such order is not entered, the court has the power, at a later date, to order that the entry of the order submitting such motion be then entered *nunc pro tunc*, as of the previous date.
- [4] ID.—NEW TRIAL—DENIAL BY LAPSE OF TIME—SUBSEQUENT ORDER VOID.—The failure of the court to determine a motion for a new trial within three months after notice of entry of judgment has the effect of a denial of the motion, and an order of the court thereafter made purporting to grant a new trial on certain issues is beyond the jurisdiction of the court and void.
- [5] ID.—ORDER VACATING JUDGMENT—REVIEW ON APPEAL—POWER OF TRIAL COURT TO VACATE.—Assuming the validity of an order set-

ting aside a judgment in part, it is subject only to be set aside on appeal or under proper proceedings under section 473 of the Code of Civil Procedure. The trial court has not the power, of its own motion and without notice to the parties affected, to make a second order vacating such first order, even though the latter order was inadvertently made.

- [6] **ID.—MOTION TO VACATE—POWER OF COURT—ENTRY OF NEW JUDGMENT.**—On a motion under sections 663 and 663a of the Code of Civil Procedure, the only order within the power of the court is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void, and not merely erroneous.
- [7] **ID.—VOID ORDER SETTING ASIDE—POWER OF COURT TO VACATE.**—A trial court may, of its own motion and without notice to the parties affected, make an order vacating a previous order, made on a motion under sections 663 and 663a of the Code of Civil Procedure, purporting to set aside a judgment in part, where the latter order did not direct what judgment should be entered.

**PROCEEDING in Certiorari** to review an order of the Superior Court of the City and County of San Francisco, George A. Sturtevant, Judge, granting a new trial and an order vacating the judgment. Orders annulled.

The facts are stated in the opinion of the court.

Raine Ewell for Petitioner.

Jos. L. Taaffe for Respondents.

**BRITTAIN, J.**—The petitioner, wife of William Lawrence Dolan, joined as one of the respondents here, was granted an interlocutory decree of divorce on the ground of extreme cruelty. By the decree certain provision was made for the maintenance of four minor children and certain community property was set aside to the wife. The decree also determined that other real property, the title to which it is averred stood of record in the name of the wife, was her separate property. The decree was made and entered on November 14, 1919, and thereafter on November 28, 1919, notice of motion for new trial was served and filed. [1] On the same day a single notice of motion to vacate the

judgment was served. Two grounds were specified, the first being that the conclusions of law were not consistent with, nor supported by, the findings; and the second, that the findings were signed inadvertently in that they were not first presented to the defendant or his counsel. A motion to vacate the judgment, based on the first ground, was permissible under sections 663 and 663a of the Code of Civil Procedure. Those sections do not provide for setting aside a judgment on the ground of inadvertence. [2] Relief from judgments entered through inadvertence, surprise, or excusable neglect must be sought by a motion made under section 473 of the Code of Civil Procedure. The record here does not show what the moving papers were nor what showing was made when the motions were presented.

Both motions, together with a cross-motion for additional attorney's fees, were presented to the court on January 30, 1920, the case having been transferred from the department of the superior court in San Francisco where it was first tried to another department presided over by a different judge.

The minute order made on January 30, 1920, did not mention the presentation or submission of the defendant's motion for a new trial. It stated that the defendant's motion to vacate the judgment was submitted and taken under consideration and that the plaintiff's motion for counsel fees was similarly submitted. On February 13, 1920, a minute entry was made. It recited that the court having considered and being fully advised concerning defendant's motion to vacate the judgment it is ordered that the motion be granted as to the property rights of the parties. If the court had considered that motion as one made pursuant to section 473 of the Code of Civil Procedure on the ground of inadvertence in the signing of the findings, the order would necessarily have set aside the entire judgment. Since it was limited to that portion of the judgment relating to the property rights, it must have been considered by the trial court as having been made under sections 663 and 663a of the Code of Civil Procedure. It is to be noted that this order did not direct the entry of any other judgment. It was also ordered that plaintiff's motion for counsel fees be denied. There was no reference to the motion for new trial.

On February 25, 1920, two minute orders were made, the first reading: "It appearing to the satisfaction of the court that the order heretofore made herein on the thirtieth day of January, 1920, to wit: Submitting the defendant's motion for a new trial having been inadvertently not entered, it is by the court ordered that the entry of said order be made this day *nunc pro tunc*, as of the thirtieth day of January, 1920. And it is further ordered that said defendant's motion for a new trial be, and the same is hereby, granted as to the property rights of the said parties to the said action, otherwise said defendant's motion stands denied, and it is further ordered that said order be entered this day *nunc pro tunc* as of February 13, 1920."

[3] The first clause of this order was clearly within the power of the court, which may always correct its minutes so that they shall speak the truth. (*Garoutte v. Haley*, 104 Cal. 497, [38 Pac. 194].) Assuming that there was a mere ministerial inadvertence in omitting the order of submission of the motion for a new trial, it does not appear that the judicial function of determining that motion was exercised in any way until February 25, 1920. [4] This was more than three months after the service of notice of the entry of the judgment on November 19, 1919. The failure of the court to determine the motion for a new trial before the expiration of the statutory period had the effect of a denial of the motion. (Code Civil Proc., sec. 660; *Estate of Waters*, 181 Cal. 584, [185 Pac. 951]; *San Francisco etc. Rys. v. Superior Court*, 172 Cal. 544, [157 Pac. 604].) It is stated in the affidavit of the attorney for the respondent Dolan that on February 13, 1920, the court made and gave its order granting the motion for a new trial as to the property rights of the parties. This statement contradicts the order of February 25th. If the trial court in fact made the order granting the new trial on February 13th and by the later order sought only to correct the inadvertence of the clerk, it would no doubt have said so as it did in regard to the order of submission, and it would not in terms and by the most apt language have made a new order granting a new trial nor ordered the new order to be entered *nunc pro tunc*. On *certiorari* this court is bound by the record, particularly when, as here, the respondent court and judge stand upon it. (*City of Los Angeles v. Young*, 118 Cal. 295, [62 Am. St.



Rep. 234, 50 Pac. 534]; *Borchard v. Board of Supervisors*, 144 Cal. 14, [77 Pac. 708].) Upon the record before this court it is concluded that the order of February 25th in so far as it purported to grant a new trial on certain issues was beyond the jurisdiction of the superior court and void. The motion for a new trial was terminated by the expiration of the time limited for its consideration.

What has been said concerning the ineffectiveness of the affidavit to contradict the record certified gains force in considering the effect of another order made on February 25th. It is as follows: "It appearing to the satisfaction of the court that the order heretofore made and entered on the 13th day of February, 1920, to wit: Granting the defendant's motion for an order vacating the judgment and decree heretofore entered herein and based on the findings of fact made by said court, as to the property rights, having been inadvertently made, it is by the court ordered that said order be and the same is hereby vacated and set aside, and it is further ordered that said defendant's motion . . . be and the same is hereby denied, and it is further ordered that said order be entered this day *nunc pro tunc* as of February 13, 1920." A reading of this order in connection with the order purporting to grant a new trial can leave no doubt upon the question concerning what orders were made on February 13th, nor that when the court reconsidered them on February 25th the judge concluded and quite clearly stated that he made the order vacating the judgment and did not make the order granting a new trial on February 13th, although he may have intended to do just what he attempted to do on February 25th.

Because of the action of the trial court in making the order purporting to vacate the order setting aside the judgment in part, it is deemed proper for the information of the trial court and of counsel to state the views of this court in regard thereto, in order that there may be no misconception of the effect of this decision. The second order purporting to set aside the order vacating the judgment was invalid if the first order be considered as having any effect. [5] Assuming the validity of the first order, it was subject only to be set aside on appeal or under proper proceedings under section 473 of the Code of Civil Procedure. After a court has acted judicially it may not seek to correct its own errors

by changing its judgments and orders without notice to the parties affected. Such action would very shortly deprive all judgments of their character of finality. (*Lang v. Superior Court*, 71 Cal. 491, [12 Pac. 306, 416]; *Carpenter v. Superior Court*, 75 Cal. 596, [19 Pac. 174]; *Holtum v. Grief*, 144 Cal. 521, [78 Pac. 11]; *United Railroads v. Superior Court*, 170 Cal. 760, [Ann. Cas. 1916E, 199, 151 Pac. 129]; *Gill v. Pep-pin*, 41 Cal. App. 487, [182 Pac. 815].) If the order was improvidently made, upon a proper showing and on notice it may be set aside, but the court cannot without notice and upon no showing justify a review of its own judicial act by a mere recital that it made the first order inadvertently. In this case there does not appear to have been either notice given the petitioner of the contemplated action of the court or any showing of inadvertence other than that the trial court determined on second thought that it was in error when it first acted. If the first order was a valid exercise of the power of the court, under section 663 of the Code of Civil Procedure the second order was beyond the jurisdiction of the court.

The validity of the order vacating the judgment depends upon whether or not it is within the powers defined in sections 663 and 663a of the Code of Civil Procedure. Without the decision it is impossible to determine whether this objection to the judgment was well taken or not, and in support of the action of the trial judge, for the present purpose it must be assumed that it was. It does not follow however, that the order vacating the judgment was within the jurisdiction of the trial court. Section 663 of the Code of Civil Procedure provides that a judgment may be set aside and another and different judgment entered when the findings do not support the conclusions of law, and, that when the judgment is set aside, the conclusions of law shall be amended and corrected. (Code Civ. Proc., sec. 663.) The notice of motion is required to specify the particulars in which the conclusions of law are not consistent with the findings, and an order granting the motion may be reviewed on appeal. (Code Civ. Proc., sec. 663a.) These code provisions are consistent with the rule that litigation must not be piecemeal. If the original judgment is correct, the party in whose favor it was is entitled to have it enforced, and, if it is not supported by the findings, the other party is entitled

to have another and correct judgment entered. In either case the loser is given the right of appeal. The code sections do not permit two motions to be made, nor two orders, one setting aside the judgment and another at a later day directing the entry of a different judgment. [6] If on the motion it appears to the court that the findings require the judgment to be set aside, it must also appear what conclusions of law should be made on the facts, and the only order within the power of the court under these circumstances is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void and not merely erroneous. Any other rule might lead to interminable delays and the loss of important rights by litigants. On such a motion the court has no power to consider or determine any matter except what judgment should be entered upon the facts as found. (*Swift v. Occidental etc. Co.*, 141 Cal. 166, [74 Pac. 700]; *Dahlberg v. Girsch*, 157 Cal. 325, [107 Pac. 616]; *Hole v. Takekawa*, 165 Cal. 372, [142 Pac. 445].) [7] A void order may be swept aside whenever it comes before a court, and the order vacating the judgment without directing what judgment should be entered was such an order. Upon the present state of the record the original judgment stands unaffected by the subsequent proceedings, unless it be modified or set aside on appeal or in some other way permitted by the statutes.

The order granting the new trial and the order vacating the judgment respectively are annulled.

Langdon, P. J., concurred.

Nourse, J., having rendered the judgment attacked in the proceeding herein reviewed, did not participate in the decision.

[Civ. No. 2789. Second Appellate District, Division One.—April 28, 1920.]

H. STOTT, Respondent, v. THE SOUTHERN SIERRAS POWER COMPANY (a Corporation), Appellant.

- [1] **NEGLIGENCE—PRIMA FACIE PRESUMPTION—BURDEN OF PROOF.**—The presumption which in certain cases is available to a plaintiff as showing, *prima facie*, negligence on the part of a defendant, is one which in its practicable application results only in shifting the burden of proof, and in cases where the bare circumstances of an occurrence, as to the cause of which negligence is charged, are shown, if the defendant by uncontradicted evidence clearly shows that he has used the degree of care required of him in the circumstances, the plaintiff must fail of recovery.
- [2] **ID.—ELECTRIC CORPORATIONS—DEGREE OF CARE REQUIRED.**—Persons engaged in the business of supplying electric current, the agency involved being a dangerous one, are required to use great care to see that injury to others is not caused thereby.
- [3] **ID.—EXERCISE OF PROPER CARE—WHEN QUESTION OF LAW—CASE AT BAR—EVIDENCE.**—The question whether a company engaged in the business of supplying electric current discharged its obligation by properly constructing, installing, and inspecting its power line becomes a matter of law wherever the facts are clearly settled and the course which common prudence dictates can be readily discerned; and in this action for damages suffered by plaintiff because of the burning of certain hay, the fire having been caused by a "short" due to the cracking or puncturing of certain insulators on defendant's power line, the evidence was clear and satisfactory to the point that defendant had used that degree of care required of it in the circumstances.

**APPEAL** from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. Reversed.

The facts are stated in the opinion of the court.

1. Presumption of negligence from accident or injury, notes, 43 *Am. Rep.* 73; 6 *Am. St. Rep.* 792; 113 *Am. St. Rep.* 986.

Applicability of *res ipsa loquitur* doctrine to accidents on private property due to escape of electricity from disordered electrical appliances, notes, 22 *L. E. A. (N. S.)* 1183; 32 *L. E. A. (N. S.)* 848.

2. Duties and liabilities of electric corporations, note, 100 *Am. St. Rep.* 515.

Issac B. Potter, Newman Jones and Henry W. Coil for Appellant.

McNabb & Hodge for Respondent.

JAMES, J.—Appeal by defendant. Plaintiff was awarded judgment in the sum of five hundred dollars as damages which he alleged he had suffered because of the burning of a lot of hay. The burning of the hay was caused by fire which originated on a pole belonging to the defendant corporation, which pole held wires carrying high voltage of electricity. Fire was communicated from the pole to some dry grass and spread for a distance of perhaps half a mile, finally igniting the hay of the plaintiff. The fire was caused at the pole by a short circuit. Two insulators, which sustained one of the wires, which wire was carrying thirty-three thousand volts of current, broke down, and the current, in its course to the ground and in overcoming the resistance offered by the pole, ignited the top of the latter. The wire did not fall to the ground, but remained suspended. Sparks from the burning pole were blown to the dry grass, with the result first indicated. The record shows no dispute to have been made as to the facts. Plaintiff on his part opened his case by showing the bare facts as to the causing of the fire and the amount of damage done. He called, as one of his witnesses, the superintendent of the defendant company, who testified on direct examination as to the wire construction at the pole which was burned. On cross-examination the witness was asked many questions relative to the care used in guarding against occurrences of the kind complained of; and at the conclusion of plaintiff's evidence a motion for judgment of nonsuit was made by defendant and denied by the court. One of the complaints here is that the court erred in denying this motion, because, as urged, the plaintiff had failed to establish any negligence on the part of the defendant. As the substance of all the evidence is before us and the case presented is one where no actual conflict of testimony appeared, the question as to whether the court erred in its ruling on the motion for nonsuit need not be separately considered. The important point in this appeal is as to whether upon the whole evidence such

a case was presented as authorized the court to make the findings and enter the judgment appealed from.

[1] Before entering into a more detailed statement of the particular facts shown in evidence, it may be stated that the position of respondent is that, having shown the circumstances attending the burning of the pole and the igniting of the grass and hay, he established, under the *res ipsa loquitur* rule, a *prima facie* case, and that the evidence of the defendant as to the care used in constructing and maintaining the defendant's lines furnished a case which should be considered as one presenting a conflict, and hence one which the trial court had the sole province of determining on the facts. Such is not the law as we understand it. The presumption which in certain cases is available to a plaintiff as showing, *prima facie*, negligence on the part of a defendant is one which in its practical application results only in shifting the burden of proof. "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." (Shearman & Redfield on Negligence, 6th ed., sec. 59.) So in cases where the bare circumstances of an occurrence as to the cause of which negligence is charged are shown, if a defendant by uncontradicted evidence clearly shows that he has used the degree of care required of him in the circumstances, the plaintiff must fail of recovery. [2] In the first place, we think that it is now well established that persons engaged in the business of supplying electric current, the agency involved being a dangerous one, are required to use great care to see that injury to others is not caused thereby. (Keasbey on Electric Wires, 2d. ed., sec. 241.) To say that the care required to be used is proportionate to the dangerous agency being handled is to merely state the requirement in different terms. [3] The question we ultimately reach in this case, and the question determinative of this appeal, is as to whether the defendant established by its evidence that it had discharged its obligation by properly constructing, installing, and inspecting its power line. The question becomes a matter of law wherever the facts are clearly settled and "the course which common

prudence dictates can be readily discerned." (*Van Praag v. Gale*, 107 Cal. 438, [40 Pac. 555].) The following cases are also in point: *Davis v. California Street Cable Ry. Co.*, 105 Cal. 131, [38 Pac. 647]; *Herbert v. Southern Pac. Co.*, 121 Cal. 227, [53 Pac. 651]; *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45. Conversely stated, the rule is that if, upon uncontroverted facts, reasonable deductions are suggested, both in the affirmative and negative of the question, then the decision of the court or jury must be taken as final. We are of opinion that the evidence in this case was clear and satisfactory to the point that the defendant had used that degree of care required of it in the circumstances, and that the judgment entered was erroneous. It was shown in evidence that the "short" which caused the fire was occasioned by the cracking or puncturing of two insulators mounted in series, one of which was attached to the pole and the other to the end of the current wire. The insulators were called strain insulators, and a loop wire was used to conduct the current over the pole and to the continuing wire on the other side, which was in like manner supported. These two particular insulators had been in use for at least four years. The testimony of the defendant was that they were the best known in the market, "the best that money could buy," and were those commonly and generally used by power companies; that the individual insulator had been tested to carry several times the voltage being conducted in the wires at the time; that a patrolman was employed by the company whose business it was to constantly patrol the power lines, and that he had traversed this line about four days before the "short" occurred; that he had not mounted the pole to inspect the insulators, but observed them from the ground to find whether they had become nicked or the wires loosened; that when any such defects were discovered report was immediately made; that insulators sometimes break down in the manner that the particular insulators here used did, and the current become shorted; that if an insulator cracked, the current would short; that it was impracticable to take down insulators and test them, because the current would have to be shut off from the wires and the business of the company interrupted if such were done; that even though an insulator should be taken off and subjected to a special test, it might crack within thirty seconds

after being replaced upon the pole; that the fact that the particular insulators had remained in service four years would be an indication that they were originally sound and sufficient in insulating properties; that when the "short" occurred which caused the fire the superintendent had almost immediate notice of it by the cessation of power on the line, and that the defect was found and remedied as soon as possible thereafter. The expert witness of the defendant testified that temperature changes would sometimes crack insulators, and that the day on which this "short" occurred was an unusually warm one, the thermometer registering in that vicinity about 117 degrees. The trial court evidently held the view that the law imposed upon the defendant practically the obligation of an insurer, rather than to use great care. In the opinion of the trial judge, which is printed in the record, the judge said: "And the court is of the opinion that in the construction of its pole line the defendant has used the latest improved insulators and all other appliances known to the business in which defendant is engaged. In fact, it appears from the testimony that the defendant has exercised not only due care, but the greatest of care in the construction of its line of poles and wires in the vicinity where the fire occurred." The conclusion indicated by the trial judge is not in accord with modern authority, as will be seen by an examination of the text in Mr. Keasbey's work, above cited; we have already stated the rule in that regard. The evidence, to our minds, clearly establishes without conflict that the defendant had discharged its obligation and exercised the full degree of care required of it.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.



[Civ. No. 2847. Second Appellate District, Division One.—April 28, 1920.]

**HOGUE-KELLOGG COMPANY (a Corporation), Respondent, v. J. S. BAKER, Appellant.**

- [1] **CONTRACTS—SALE OF CROP TO BE GROWN.**—A valid contract may be made for the sale of a crop to be grown in the future by the vendor where such vendor possesses the land upon which the crop is to be grown.
- [2] **ID.—CONSTRUCTION OF—PASSING OF TITLE.**—A provision that such contract shall pass title and constitute an absolute sale, with a risk on the grower for loss or damage until delivery, will be construed to mean only that title should be deemed to pass whenever the produce becomes a growing crop. It is competent for the parties to so contract.
- [3] **ID.—SECTION 1141, CIVIL CODE, APPLIED.**—Assuming that the provision that such contract should pass title is void, it will not vitiate the main contractual obligation imposed upon the seller, which is to grow and deliver the crop, but in that case section 1141 of the Civil Code, which declares when title is transferred by an executory agreement for the sale of personal property, is applicable.
- [4] **ID.—LIABILITY OF BUYER FOR PURCHASE PRICE — MUTUALITY OF CONTRACT.**—Such a contract requiring the seller to grow and deliver a certain crop is not lacking in mutuality where its terms are sufficient to enable him, if he produces a crop and offers it to the buyer and the latter refuses to accept it, to enforce the term of the contract which provides for the payment of the purchase price agreed upon.
- [5] **ID.—ACTION FOR BREACH — ALLEGATION OF DAMAGE — VALUE OF CROP.**—In an action by the purchaser against the seller for damages for breach by the latter of a contract to grow and deliver a certain crop of beans, an allegation in the complaint of the price at which the plaintiff "might have bought" beans in the market at the time delivery from defendant was due is insufficient as an allegation of damage, as it is not an allegation of the valuation of the beans to the plaintiff or the market value thereof.
- [6] **ID.—PLEADING — DAMAGES — SUFFICIENCY OF COMPLAINT.**—In such an action, the plaintiff, after alleging the making of the contract,

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1. Sale or mortgage of future and growing crops, notes, 23 L. R. A. 449; L. R. A. 1917C, 8.

4. Mutuality of obligation where one party's obligation is not definite and certain, note, 1 L. R. A. (N. S.) 445.

the terms thereof, and the breach committed by the defendant, is not required to plead the particulars as to why and how he has been damaged, but may allege generally that by reason of the failure and refusal of the defendant to grow and deliver the crop in question he had been damaged in a given sum.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. H. Ardis and W. S. Knott for Appellant.

Fred N. Arnoldy for Respondent.

**JAMES, J.**—Appeal from a judgment entered in favor of the plaintiff upon an alleged cause of action for damages arising because of defendant's failure to perform the obligations imposed by written contract.

The case went to judgment after answer and trial. The only contention made by appellant, however, is that the court erred in overruling his demurrer, which was interposed to the complaint of plaintiff. It is insisted that the complaint failed to state facts sufficient to constitute a cause of action. The contract for the breach of which plaintiff sought damages is set out in the complaint and is as follows:

"J. S. Baker of Norwalk, California, does hereby agree to grow for The Hogue-Kellogg Company, of Ventura, California, 20 acres of Henderson Bush beans, to be grown during the farming season of 1917, on land situated near Norwalk, Calif., known as Baker ranch, and to deliver the entire crop product thereof. The beans are to be delivered as soon as possible after threshing, properly recleaned, free from damage of any kind, in first-class shipping condition, sacked in new bean bags to be even weighted and so stenciled, f. o. b. cars at Buena Park, Calif.

"The Hogue-Kellogg Company agrees to pay for said beans on net weight at \$4.25 dollars, per hundred pounds, delivered f. o. b. cars at Buena Park, Calif., on or before December 1st, 1917. And in case delivery is not made within the final time limit, it is optional with the Hogue-Kellogg Company to consider this contract in force or to cancel same.

"In case it rains, damaging the beans, said beans shall be handpicked and put in the condition as above stated.

"It is mutually agreed that The Hogue-Kellogg Company will sell seed beans for planting the above acreage at the rate of \$4.25 dollars per hundred pounds, f. o. b. Ventura, Calif., payment to be made when the crop is delivered.

"This contract is understood by both parties to pass title and constitute absolute sale, but until delivery has been completed grower agrees to and does assume all risk of loss or damage. Time is the essence of this contract and any controversy arising under this contract is to be settled by arbitration; each party hereto to select one arbitrator and the two jointly to select a third, the decision of a majority of said arbitrators to be final and binding on both parties."

Appellant insists that the contract was invalid because it contemplated a completed sale of property not in existence, and that it is void for want of mutuality. The third point made has to do with the sufficiency of the allegations in the complaint affecting plaintiff's alleged damages. [1] It is well-settled law that a valid contract may be made for the sale of a crop to be grown in the future by the vendor where such vendor possesses the land upon which the crop is to be grown, for in such case it appears that the needful thing out of which the crop is to be produced is in existence, and hence the crop has legal potentiality. (*Arques v. Wasson*, 51 Cal. 620, [21 Am. Rep. 718]; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, [21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52]; Benjamin on Sales, 7th ed., sec. 311.) It was alleged in the complaint that at the time of the making of the contract and subsequent thereto defendant was the owner and in possession of the twenty acres of land referred to in the written contract. We construe the contract to be executory. [2] The mere fact that the writing provided that the contract should pass title and constitute an absolute sale, with a risk on the grower for loss or damage until delivery, should be held to mean only that title should be deemed to pass whenever the produce became a growing crop. It was competent for the parties to so contract. (*Farmer v. Leaf*, 46 Cal. App. 542, [189 Pac. 735].) [3] But were we to assume that that particular term of the contract was void, it would not vitiate the main contractual obligation imposed upon the defendant, which was to grow

and deliver the crop. In that case section 1141 of the Civil Code would apply, which declares that title is transferred by an executory agreement for the sale of personal property when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer title thereto. [4] There was no lack of mutuality in the obligations imposed by the contract. Plainly its terms were sufficient to have enabled the defendant, had he produced a crop and offered it to the plaintiff and had the latter refused to accept it, to enforce that term which provides for the payment of the price agreed upon. That term is definitely stated, to wit: "The Hogue-Kellogg Company agrees to pay for said beans on net weight at \$4.25 dollars, per hundred pounds, delivered f. o. b. cars at Buena Park, Calif., on or before December 1st, 1917." The condition immediately following, that in the event there was a failure to deliver it would be optional with the vendee to cancel the contract or continue it in force, was a mere statement of the legal right of the vendee upon default being made by the vendor.

As to the allegation of damage, plaintiff particularly alleged the making of the contract, the terms thereof, and the breach committed by the defendant; it alleged that by reason of the failure and refusal of the defendant to grow and deliver the beans plaintiff had been damaged in the sum of \$775, and that the damages had not been paid. [5] It is the position of appellant that the particulars as to why and how the plaintiff had been damaged should have been specially alleged; and in this regard it is claimed that an additional allegation contained in the complaint, which was that at the time when performance was due the price at which the plaintiff "might have bought" the equivalent of the beans agreed to be grown and delivered and which the land was capable of producing was the sum of twelve dollars per hundred pounds, is insufficient. This allegation, of course, if that matter was required to be specially pleaded, as contended for by appellant, was insufficient, for section 3308 of the Civil Code declares that the detriment caused by the breach of a seller's agreement to deliver personal property is "the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been

fulfilled." The statement in the complaint of the price at which the plaintiff "might have bought" beans in the market at the time delivery from defendant was due is not an allegation of the value of the beans to the plaintiff or the market price thereof. [6] But we think the plaintiff was not required to particularly plead the facts as to how the damage arose. "At the common law, general damages, such as the law presumes to arise, as being the natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule." (*Riverside Coal Co. v. Holmes*, 36 Neb. 858, [55 N. W. 255].) "Under a general allegation of damages a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of. These damages the law implies will proceed from the act, although the amount may often be in the reasonable discretion of the jury. They are called 'general,' as contradistinguished from 'special,' damages, which are required to be specially stated in the declaration." (*Mitchell v. Clarke*, 71 Cal. 163, [60 Am. Rep. 529, 11 Pac. 882]; *Barber v. Cazalis et al.*, 30 Cal. 92.) A still further answer to the contention of appellant is that, as against the general demurrer, the complaint was sufficient to support a judgment for nominal damages, even though matters required to be specially pleaded were omitted therefrom. (*McCarty v. Beach*, 10 Cal. 461; *Moody v. Peirano*, 4 Cal. App. 411, [88 Pac. 380].)

For the reasons stated, the judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2179. Third Appellate District.—April 28, 1920.]

E. W. LAWSON, Petitioner, v. TURLOCK UNION HIGH SCHOOL DISTRICT et al., Respondents.

- [1] **SCHOOL LAW—CHANGE OF SITE OF HIGH SCHOOL WITHIN CITY—POWER OF BOARD OF TRUSTEES.**—Under the amendment to section 1742 of the Political Code, enacted in 1919, the board of trustees of a high school district having a school building within the limits of an incorporated city by a majority vote may change the site of the high school from one place to another within the corporate limits whenever a new building is to be erected.
- [2] **ID.—CONSTITUTIONALITY OF CODE AMENDMENT.**—The amendment to section 1742 of the Political Code, enacted in 1919, which permits the board of trustees of a high school district having a school building within the limits of an incorporated city, by a majority vote, to change the site of the high school from one point to another in the same city is not obnoxious to the provisions of article IV, section 25, subdivision 28, of the state constitution, which provides that the legislature shall not pass local or special laws prescribing the powers and duties of officers of school districts.

**APPLICATION** for a Writ of Certiorari to review the action of the board of trustees of a high school district in changing the site of the high school. Writ denied.

The facts are stated in the opinion of the court.

Hawkins & Hawkins for Petitioner.

L. J. Maddux for Respondents.

**PREWETT, P. J., pro tem.**—This is an application by petitioner for a writ of *certiorari* to above-named respondents to review the action of said respondents as trustees of Turlock Union High School District in changing the site of the high school from its former position in said city to another about one mile distant. It is contended by petitioner that the trustees exceeded their powers in ordering the change. Although the record in the matter is somewhat voluminous, the actual question to be determined is very narrow.

Turlock is an incorporated city, and prior to October, 1919, said high school district owned and maintained a high

school upon certain premises within said city, which premises had been regularly selected and designated for that purpose. The union district covers an extensive area of territory outside of the corporate limits of said city and includes said city. In October, 1919, said trustees by a majority vote changed said high school from its former position to a tract of about twenty-three acres situated in another part of the city. In February, 1920, petitioner herein commenced an action in injunction in the superior court in an effort to restrain said trustees from proceeding with said proposed change. Judgment was rendered against him and his appeal is now pending therefrom.

[1] (1) Waiving the question whether petitioner has a speedy remedy by appeal, the decisive point against him is that the amendment to section 1742 of the Political Code, enacted in 1919, [Stats. 1919, p. 1086], justifies the board in its action. The portion of said section relevant to this inquiry now reads as follows: "With the following exception, no change of location of any high school when once established, shall be made except upon a petition to the superintendent of schools who has jurisdiction of the high school district, and then only upon the affirmative vote of two-thirds of the qualified electors of the high school district voting at an election called by the superintendent of schools for that purpose. Such election shall be called and held, and the returns thereof made to the superintendent of schools in the same manner as in the case of the election for the formation of the district; *provided*, however, that when any location has been once established in any of said districts, and said location lies within the corporate limits of any incorporated city or town any change of location within the corporate limits of said city or town may be made upon any such change of location receiving the vote of a majority of the board of trustees of any such district whenever a new building is to be erected." The proviso is the portion added by the amendment of 1919. Its terms are clearly broad enough to justify the action taken by the trustees if the act is open to no constitutional objection.

[2] (2) It is claimed, however, that the amendment is obnoxious to that provision of the constitution which provides that the legislature shall not pass local or special laws prescribing the powers and duties of officers of school dis-

tricts. (Const., art. IV, sec. 25, subd. 28.) Admittedly, the amendment does prescribe the powers and duties of school officers. If the amendment is neither local nor special it is immaterial whether the term "school districts," as used in the above-cited provision of the constitution, is broad enough to include high school districts. A strong intentment exists in favor of an act of the legislature and a court should declare it unconstitutional only for the most cogent reasons. The amendment in question applies to all high school districts in the state that have a school building within the limits of an incorporated city. This means, potentially, every high school district in the state, for if it has no school building within an incorporated city to-day it may have one to-morrow. Classification that is reasonable and not arbitrary does not vitiate a statute. (6 R. C. L. 372.) The distinction established by the legislature is not an arbitrary one. There are sufficient differences between a location in a city and one in the country to justify the classification established in the amendment. Conceding that the change of site from one point to another in the same city is a change of location, within the purview of the amendment, the fact that such change could be for only a limited distance, while in the country it might be for many miles, is itself a sufficient difference in conditions to save the amendment. Moreover, the opportunity for securing favorable sites within a city is manifestly less than in the open country. In dealing with many owners of a block within a city, flexibility of power to contract for options, wider discretion, and greater facility for rapidity of action are necessary. In the country, a removal to a new location, miles distant from a former site, might inconvenience large numbers of pupils, while, ordinarily, the greatest possible removal within a city could not greatly inconvenience anyone. In the country, serious or dangerous obstacles to travel, even though the removal be for only a short distance, might operate to deny the benefits of the school to many persons, while such a result is scarcely possible in a city.

These distinctions exist. They are sufficient to justify the classification established in the amendment. That they are sufficient, in the opinion of the law-making body, to de-



mand such classification is answered by the adoption of the amendment.

The writ is denied and the proceeding dismissed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 24, 1920, and the following opinion then rendered thereon:

**THE COURT.**—The application for a hearing in this court after decision by the district court of appeal of the third appellate district is denied.

We deem it necessary to say, however, that the decision must not be taken as a precedent for the proposition that *certiorari* will lie to review decisions of a tribunal, board, or officer, not made in the exercise of judicial functions (Code Civ. Proc., sec. 1068), nor for the proposition that the order of the trustees of a union high school district changing the location of a high school building is other than a legislative or executive act. (*Hopping v. Richmond*, 170 Cal. 612, et seq., [150 Pac. 977].)

All the Justices concurred.

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[Civ. No. 3151. Second Appellate District, Division One.—April 29, 1920.]

**UNIVERSAL FILM MANUFACTURING COMPANY** (a Corporation), Respondent, v. **J. WARREN KERRIGAN**, Appellant.

[1] **APPEAL—ACTION FOR DAMAGES—NEW TRIAL AS TO SINGLE ISSUE—ABSENCE OF APPEALABLE JUDGMENT.**—In an action for damages for breach of contract to render personal services, where a motion for a new trial is granted and a new trial ordered as to the issue or issues presenting a question of the amount of damages suffered by the plaintiff, and as to all other issues the motion for a new trial is denied, nothing effective as a judgment remains in existence; and an attempted appeal "from the whole of the said judgment, except the part and portion thereof vacated by the order of the said court," etc., must be dismissed.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Appeal dismissed.

The facts are stated in the opinion of the court.

Ray L. Chesebro and Edward Winterer for Appellant.

Loeb, Walker & Loeb for Respondent.

CONREY, P. J.—Action to recover damages for breach of contract to render personal services. Defendant denied that he entered into the alleged contract; also denied the alleged breach of contract, and denied that plaintiff was damaged thereby. There were further issues, including those presented by cross-complaint and the answer thereto. After entry of judgment against defendant for a stated amount, the defendant gave notice of intention to move the court “to vacate and set aside the decision and judgment” entered, and to grant a new trial of the action. That motion having been presented in due course, it was ordered that “said motion for a new trial herein is granted and a new trial is ordered as to issue or issues presenting the question of the amount of damages suffered by the plaintiff; as to all other issues the motion for a new trial is denied.” Thereafter the defendant gave notice of appeal “from the whole of the said judgment, except the part and portion thereof vacated by the order of the said court in granting in part defendant’s motion for a new trial, to wit,” etc.

[1] Although the appeal has been presented by briefs arguing the case on its merits, the court is forced to take notice of the fact that there is no judgment, and, therefore, there can be no appeal therefrom. The order for retrial of the issue as to amount of damages necessarily set aside the judgment. This is an action at law, wherein the judgment is single and indivisible, for it consists of only the one order that the plaintiff recover from the defendant so much money. Taking out that recovery, nothing effective as a judgment remains in existence.

In arriving at this conclusion, we have not excluded from consideration those decisions by which it has been determined that an order granting a new trial does not absolutely vacate the judgment until the order has become final.

(*Sherwin v. Southern Pacific Co.*, 168 Cal. 722, [145 Pac. 92], and cases cited.) We also have in mind the amendments enacted in 1915, [Stats. 1915, pp. 209, 328], to certain sections of the Code of Civil Procedure, whereby the right of appeal from an order granting a new trial, in cases tried as was the case at bar, was taken away, and whereby it was provided that on appeal from the judgment the court may review any order on a motion for a new trial. (Secs. 956, 963, Code Civ. Proc.)

In this case the defendant has sought to accept the benefit of the order to the extent that it granted him a new trial of the issue as to damages. To that extent the order has become final, for any claim of right to have it reviewed—assuming that any such claim could be asserted by defendant—has been expressly excluded by the terms of the notice of appeal. But it is a necessary incident to the finality of the order, to the extent that it provided for a new trial, that the whole judgment was set aside, because the specified issue could not be tried after judgment and while the judgment remained in force.

It is true that certain findings of fact have been left undisturbed. When the issue selected for retrial has been tried, and findings thereon have been made, and a new judgment entered, the appeal, if any be taken, will come as an appeal from that judgment, and may include a review of the entire record.

The appeal is dismissed.

Shaw, J., and James, J., concurred.

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[Civ. No. 3440. First Appellate District, Division Two.—April 29, 1920.]

**OAKLAND STREET IMPROVEMENT BOND CO.** (a Corporation), Petitioner, v. **W. M. FITZMAURICE**, as City Treasurer, etc., Respondent.

[1] **STREET LAW—ISSUANCE OF BONDS—DEFAULT IN PAYMENT—DEMAND FOR SALE OF PROPERTY—LAW GOVERNING.**—Where the Improvement Act of 1911, at the time certain street work was performed and bonds were issued, required the treasurer after default and demand to publish a notice of the proposed sale in a newspaper and that a similar notice should be "served upon any such owner, if any, either personally or by depositing the same in the postoffice," etc., the city treasurer is not justified in refusing to proceed with the sale until the bondholder shall have first deposited with him the cost of having a search of the records made for the purpose of ascertaining the names of all lienholders of record, or unless the bondholder shall have had such search made on the ground that prior to default and demand for the sale of the property that act was amended so as to require a similar notice to be mailed to the person to whom the property is assessed and to all record lienholders.

**APPLICATION for a Writ of Mandate.** Peremptory writ issued.

The facts are stated in the opinion of the court.

E. S. Page for Petitioner.

H. L. Hagan, City Attorney, and Leon E. Gray, Assistant City Attorney, for Respondent.

**BRITTAI, J.**—The respondent demurs generally to the petition on which an alternative writ of mandate was issued. The facts are not subject to controversy. A single question of law is involved.

[1] Under the Improvement Act of 1911, [Stats. 1911, p. 730], the assignors of the petitioner under public contract performed certain street work in the city of Oakland. In due course assessment was made on the property subject thereto, and upon one of the lots the amount of the assessment was secured to be paid by a lien for a statutory bond

issued by the city treasurer on October 29, 1914. After default in payment of certain installments which became due under the bond, demand was made on the respondent by the holder of the bond for the advertisement for sale and the sale of the property subject to the lien. He refused to advertise unless the bondholder should first deposit with him the cost of having a search of the records made for the purpose of ascertaining the names of all lienholders of record, or unless the bondholder should have such a search made, justifying his refusal upon the provisions contained in section 68 of the Improvement Act as that section was amended in 1919, [Stats. 1919, p. 554].

At the time of the issuance of the bond the section in question required the treasurer after default and demand to publish a notice of the proposed sale in a newspaper, and that a similar notice should be "served upon any such owner, if any, either personally or by depositing the same in the postoffice at such city, addressed to such owner at his address, if known, with postage prepaid thereon." By the amendment of 1919 the quoted clause was made to read that a notice similar to that published should "be deposited by the city treasurer in the postoffice at such city, addressed to the person to whom said property is assessed upon the last assessment-roll of such city . . . if known, and to all record lienholders with the postage thereon prepaid. When the addresses of such persons are unknown the notice shall be mailed to them at the city in which said property is located." The act makes no provision for the original cost of ascertaining the names of the lienholders of record, nor from the collection thereof from the proceeds of the sale of the property or as a part of the amount secured by the bond in the event of tender of the amount due prior to the date of sale.

The case is not to be distinguished in principle from the recent decision of the supreme court on rehearing in Bank affirming a decision of department two of the supreme court, which affirmed the judgment of the superior court in Los Angeles County. (*Chapman v. Jocelyn*, 182 Cal. 294, [187 Pac. 962].) It was there held that the case must be determined upon the act as it existed when the bond was issued. A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner

of its enforcement are a part of the contract. In effect, the bond creates a power of sale, whereby its holder may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond was issued. The constitution forbids the passage of a law impairing the obligations of a contract. "Not only is the bond and the statute a contract, but it is a contract forced upon the parties by compulsion of law." (*Chapman v. Jocelyn, supra.*)

It was well said upon oral argument that to put upon the bondholder the burden of having expert searchers of records determine the names or record lienholders, when no provision is made for the repayment of the expense of such search, would in many instances deprive such bonds of all value, because the cost would amount to more than the amount secured by the bonds.

Let the peremptory writ issue, directing the respondent to make advertisement in accordance with the provisions of the act as it stood at the date of the issuance of the bond.

Nourse, J., and Langdon, P. J., concurred.

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[Crim. No. 513. Third Appellate District.—April 30, 1920.]

In the Matter of the Application of WILLIAM GOTTSCHALK for a Writ of Habeas Corpus.

- [1] CRIMINAL LAW—VARYING TERMS OF JUDGMENT—POWER OF JUSTICE OF PEACE.—A justice of the peace has no power, after the commencement of the execution of a judgment giving the defendant the option of avoiding imprisonment by the payment of a fine, to enter an order purporting to withdraw the option and directing the imprisonment of the defendant.
- [2] ID.—APPEAL TO SUPERIOR COURT—DENIAL OF NEW TRIAL—STATEMENT OF CASE—JUDGMENT-ROLL—CONSIDERATION OF BY APPELLATE COURT UPON HABEAS CORPUS.—The statement on appeal from a justice's or police court to the superior court in criminal cases the triable jurisdiction of which is in the first named courts constitutes a part of the judgment-roll or judgment record of the case in the

superior court, where a new trial is denied; and, upon *habeas corpus*, in a criminal case so appealed to the superior court, where a new trial has been denied, it is competent and proper for the district court of appeal to look into the facts as they are presented in the statement on appeal to the superior court for the purpose of determining the question whether the justice's or police court exceeded its jurisdiction in the pronouncement of judgment of imprisonment. (Concurring opinion.)

APPLICATION for a Writ of Habeas Corpus. Petitioner discharged.

The facts are stated in the opinion of the court.

Edward J. Lynch, C. E. McLaughlin and C. P. McLaughlin for Petitioner.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

PREWETT, P. J., *pro tem.*—This is an application for a writ of *habeas corpus*. It appears from the statement of the facts accompanying the petition that one J. H. Anderson labored as a dredgerman for the Dutton Dredging Company from 12 o'clock noon on April 30th until about 7 A. M. on the seventh day of May. His working hours were so disposed that he worked twenty-four hours in each three days, not working, however, the same number of hours each day. Up to 12 o'clock noon on May 6th he had worked forty-eight hours. His only work during the seventh twenty-four hours was from midnight until 7 A. M. on May 7th, when he voluntarily quit work. This lacks one hour of being seven full days. The company paid him for seven days and one hour in conformity with his claim that he worked on the last day until 9 A. M. The check which he received was for \$26.30, which overpaid him in the sum of about twenty cents. He claimed that he should have received about three dollars more, but his own figures do not justify this claim.

At the time that he quit work the foreman made out and delivered to him a time-check for \$26.30, which check he accepted without making any claim that the amount was too small. With reference to this time-check he testified as follows: "I told him [the foreman] that I would call at the

office of the company in San Francisco and collect the money. Afterward I changed by mind and went to Sacramento instead. I did not tell the foreman that I had gone to Sacramento until several days later. The day after going to Sacramento I sent my time-check to the Dredgermen's Union in San Francisco and left it there for collection. I received the check for \$26.30 about the same day that I swore to the complaint." The time-check was not presented to the company until about May 21st, and it was paid to the Dredgermen's Union on May 22d. The money did not reach the complainant until the following day. The defendant himself resides in San Francisco and he did not have any dealings directly with Anderson. The latter did not at any time notify the company that he wanted any new provision to be made about the payment of the time-check. The justice of the peace found the defendant guilty and pronounced judgment. [1] The judgment, as originally entered, gave the defendant the option of avoiding the imprisonment by the payment of the fine. Later, however, the justice entered an order purporting to withdraw the option and directing the imprisonment of the defendant. This order was made after the defendant was taken into custody. It is true that the order directed that the fine be paid "forthwith," but all fines are payable forthwith, and the use of that word added nothing to the legal effect of the judgment. It is held in *Ex parte Sullivan*, 3 Cal. App. 193, [84 Pac. 781], that a justice of the peace has no power, after the commencement of the execution of a judgment, to vary its terms adversely to the defendant.

The petitioner is discharged.

HART, J., Concurring.—I concur in the judgment, but am of the opinion that one point not considered in the main opinion should be given some notice.

[2] At the oral argument and in the briefs, the question whether, upon *habeas corpus*, this court may, in a case cognizable in justices' or police courts, examine the facts as embraced in the statement on appeal to the superior court, was discussed and vigorously affirmed by the petitioner and likewise denied by the attorney-general.

Section 1468 of the Penal Code, which is embraced within the chapter and title of the Penal Code regulating the mat-



ter of appeals in misdemeanor cases from justices' and police courts, provides: "The appeal to the superior court from the judgment of a justice's or police court is heard upon a statement of the case settled by the justice or police judge, embodying such rulings of the court as are excepted to, which statement must be filed with and settled by the court within ten days after filing notice of appeal."

I am of the opinion that the statement on appeal from a justice's or police court to the superior court in criminal cases the triable jurisdiction of which is in the first named courts constitutes a part of the judgment-roll or judgment record of the case in the superior court, where a new trial is denied. I am therefore, of the opinion that, upon *habeas corpus*, in a criminal case so appealed to the superior court, where a new trial has been denied, it is competent and proper for this court to look into the facts as they are presented in the statement on appeal to the superior court for the purpose of aiding us in the determination of the question whether the justice's court exceeded its jurisdiction in the pronouncement of judgment of imprisonment. I do not herein intend to intimate how far this or the superior court would be permitted to go in this respect in a proceeding on *habeas corpus* where, upon a judgment of conviction and sentence in the justice's or police court, there has been no appeal to the superior court and the petition for the writ is based entirely on the proceedings in the said inferior court.

It follows that, in this case, this court was legally authorized to examine the facts contained in the statement on appeal to the superior court, and that for the reason stated in the main opinion the petitioner is entitled to his discharge.

Burnett, J., concurred.

[Civ. No. 3319. First Appellate District, Division One.—April 30, 1920.]

ANITA L. HUGHES et al., Appellants, v. ALICE SCOTT et al., Respondents.

- [1] **DEEDS — GRANT OF LIFE ESTATE — PRESENT CONVEYANCE OF REMAINDER.**—Where a deed to real property, after conveying to a given grantee a life estate therein, provides that, in the event of the death of said grantee, the property should “revert” to a daughter of the grantor, and to her heirs and assigns, and, in the event of the death of the daughter before the death of said grantee, the property should “revert” to the heirs of said grantee, and in the habendum clause there is an expression indicating the intent of the grantor to make a present disposition of the reversion in said property, such deed is operative as a present conveyance of the remainder after the termination of the life estate in the grantee.

**APPEAL** from a judgment of the Superior Court of Santa Clara County. W. A. Beasley, Judge. Affirmed.

The facts are stated in the opinion of the court.

Robert R. Syer and Owen D. Richardson for Appellants.

C. L. Witten for Respondents.

**RICHARDS, J.**—This is an appeal from a judgment in favor of the defendants in an action to quiet title. The facts of the case are undisputed and are briefly these: Michael Hughes was in his lifetime the owner of the premises in question. He had a son, William I. Hughes, who was the father of the plaintiffs herein, and a daughter, Alice Scott, who is one of the defendants, and he left surviving him his widow, Annie Hughes, another of said defendants. [1] On February 6, 1917, Michael Hughes made a gift deed of the premises in question to his grandson by another child, Leo C. Matthews, granting to the latter a life estate in said property. Following the words of said grant the deed contained this clause: “In the event of the death of said grantee herein said real property to revert to Alice Scott, my daughter, and to her heirs and assigns, and in the event of the death of said Alice Scott before the death of

said grantee herein then said property to revert to the heirs of said grantee." The habendum clause read as follows: "To have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident unto the said party of the second part during his lifetime *and as hereinbefore set forth.*" After the death of Michael Hughes this action was commenced by the plaintiffs as his children and heirs to establish and quiet their title to their alleged interest in said property. To the amended complaint filed herein the defendants interposed a demurrer which the trial court sustained, and upon failure or refusal of the plaintiffs to amend, judgment was entered in the defendants' favor, from which judgment this appeal is taken.

The sole contention of the appellants is that by the clause above quoted from said deed no present interest in said property was conveyed either to Alice Scott or to the heirs of Leo C. Matthews, the grantee named in said deed. The only authority cited by the appellants in support of this contention is the case of *McGarrigle v. Roman Catholic Orphan Asylum, etc.*, 145 Cal. 694, [104 Am. St. Rep. 84, 1 L. R. A. (N. S.) 315, 79 Pac. 447]. We think, however, that a clear distinction can be drawn between said case and the case at bar. In that case, after the grant of a life estate in the premises therein involved, the conveyance proceeded with these words: "It is the purpose of the party of the first part by this deed that after the death of the party of the second part the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco." The supreme court held that this clause contained no operative words of grant and amounted to nothing more than an expression of the grantor's purpose in relation to the future disposition of the property, and hence was inoperative to pass a reversionary interest therein. The cases which are cited in the opinion in that case as sustaining this view are found upon examination to be all cases wherein it was clearly the intent of the grantor that the conveyance of such interest should not take effect until after the grantor's death, and hence was void as testamentary in character. In the case at bar, however, the clause of the deed in question does contain words and phrases which are in the nature of operative words of grant, such as these: that in the event of the death of the grantee in said deed the

said real property should "revert to Alice Scott, my daughter, and to her heirs and assigns," and also the clause providing that in the event of the death of said Alice Scott before the death of said grantee said real property should "revert to the heirs of said grantee." In the habendum clause of said deed there is also an expression indicating the intent of the grantor to make a present disposition of the reversion in said property. It is a well-established rule of construction that all parts of a deed must be considered together and so construed as to give effect and meaning to every part thereof if possible. (Civ. Code, sec. 1641.) It is also well settled that the primary object of all interpretation of conveyances is to ascertain and carry out the intention of the parties thereto. (Civ. Code, sec. 1636; *Burnett v. Piercy*, 149 Cal. 178, [86 Pac. 603]; *Jacobs v. All Persons*, 12 Cal. App. 163, [106 Pac. 896].) The case last cited strongly resembles the case at bar in respect to the language of the conveyance involved, since after the grant of a life estate in the property the deed there in question proceeded to state "and upon and at the time of her death the title to all of said property shall pass to and be vested in" certain specified persons. This court construed said deed as conveying a life estate to the immediate grantee named therein with remainder over to the other persons to whom by the terms of said deed the said property was to pass upon the termination of the life estate. In so deciding, this court cited with approval the cases of *Barnett v. Barnett*, 104 Cal. 298, [37 Pac. 1049], *Burnett v. Piercy*, *supra*, *Henderson v. Mack*, 82 Ky. 379, *Carson v. McKashlin*, 60 Ind. 335, and *Caldwell v. Hammons*, 40 Ga. 342, in each of which the terms of the grant and reversion were similar to those in the conveyance in question here. These cases indicate what we think is the better rule to be applied to the construction of the clauses in the deed here under review, and in accordance therewith we are of the opinion that the trial court was not in error in sustaining the defendants' demurrer to the plaintiffs' amended complaint. This being so, the judgment should be affirmed, and it is so ordered.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

[Civ. No. 2677. Second Appellate District, Division Two.—April 30, 1920.]

**MARY E. MUTCH, Respondent, v. LONG BEACH IMPROVEMENT COMPANY (a Corporation), et al., Appellants.**

- [1] **CLAIM AND DELIVERY — DETENTION OF AUTOMOBILE — EXCESSIVE DAMAGES.**—Where the judgment in an action in claim and delivery to recover possession of an automobile used for pleasure purposes and damages for its detention, awards plaintiff the car, together with a sum more than half the market value thereof at the time it was taken for its depreciation during its detention, and a sum of over three times such market value for damages from being deprived of its use for about twenty months, such damages are excessive.
- [2] **ID.—MEASURE OF DAMAGES.**—While the amount to be allowed the plaintiff in such an action is to be determined according to the market value of the use of the property, it is the net usable value less the expense of keeping up the property which may be recovered; and in determining the value of the use of the property, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself.
- [3] **ID.—DETENTION UNDER ATTACHMENT BY SHERIFF—THIRD PARTY CLAIM.**—Where property is wrongfully taken on attachment, the sheriff is absolved from liability for its detention prior to the filing of a third party claim, as provided in section 689 of the Code of Civil Procedure.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Bowen & Bailie for Appellants.

Denio & Hart for Respondent.

**SLOANE, J.**—In an action in which the defendant Long Beach Improvement Company was plaintiff and John B. Mutch, the husband of plaintiff in this action, was defendant, the sheriff of the county of Los Angeles levied an attachment upon an automobile as the property of said John B. Mutch. The property was taken on attachment on Feb-

ruary 19, 1916. Subsequently the plaintiff here claimed to be the owner of the automobile, and made demand upon the defendant Long Beach Improvement Company for its possession. She made no third party affidavit of ownership nor demand upon the sheriff, under section 689 of the Code of Civil Procedure, until October 16, 1916, more than eight months after the levy. On November 26, 1916, this action of claim and delivery was brought to recover possession of the automobile and damages for its detention. During the pendency of the suit the automobile was delivered to the plaintiff, and thereafter judgment was given determining the question of ownership in plaintiff's favor and awarding her damages for the taking and detention in the sum of \$1,500.65 against both defendants.

[1] The defendants appeal from the judgment on the judgment-roll and a bill of exceptions. The main contention of appellants is that the evidence does not support the findings and judgment in the admeasurement and award of damages.

The items of damages going to make up the amount of the judgment consist of the sums of \$1,297.50, for the rental value of the car from February 19, 1916, the date of the attachment, until October 17, 1917, the date of its redelivery to plaintiff—a period of eighty-six and one-half weeks, at fifteen dollars per week—and \$203.15 for loss of tools and appliances belonging to the car, cost of cleaning the car after its recovery, and depreciation of its value during its detention. The undisputed testimony fixes the value of the car at the time it was taken on attachment at \$400. Plaintiff gets her car back, with \$203.15 for its depreciation during its detention, and with over three times its market value for damages from being deprived of its use for about twenty months.

Appellants interpose various objections to the measure of damages adopted by the trial court. Without discussing them in detail, we think it is sufficient to say that one thus deprived of the use of an automobile cannot recover the gross rental value of a fully equipped and maintained car, free from all expense of maintenance, repairs, and natural wear and tear, such as a rented car would naturally be subject to. It must be apparent at once that there is something wrong with a scale of damages that allows three times as

much for the detention of an article from the possession of the owner for a period of two years as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance. In this case the automobile was in use by the plaintiff as a pleasure car, and after its taking was not in use during its detention. But neither the fact that the plaintiff was not using the car for business nor the defendants' using it at all would absolve the defendants from compensating the plaintiff for any detriment she actually sustained by its wrongful taking and detention; but it would be against conscience to permit a recovery so out of proportion to the value of the thing involved as appears here. Section 3359 of the Civil Code provides that "damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." [2] While the amount to be allowed is to be determined according to the market value of the use of the property, it is the net usable value less the expense of keeping up the property which may be recovered. In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself; otherwise the result is not compensation for use but punishment for a wrong in a case where exemplary damages as such would not be allowed. So, where damages allowed for the detention of property for less than a year were more than twice the value of the property, it was held that such damages were grossly excessive. (23 R. C. L. 913; *Armstrong v. Philadelphia*, 249 Pa. St. 39, [Ann. Cas. 1917B, 1082, 94 Atl. 455]; Ann. Cas. 1914A, 381, note; *Romberg v. Hughes*, 18 Neb. 579, [26 N. W. 351].)

[3] Attention has been called to the fact that no third party claim was made to the sheriff, as provided by section 689 of the Code of Civil Procedure, for more than eight months after the levy of the attachment. This fact would in any event absolve the sheriff from liability for the detention of plaintiff's property for the period prior to the notice of claim. It is expressly declared by section 689 that the sheriff is not liable for damages for the taking or keeping of such property to any such third person unless such

claim is made. (Code Civ. Proc., sec. 689; *Killey v. Scan-nell*, 12 Cal. 73; *Fuller Desk Co. v. McDade*, 113 Cal. 360, 363, [45 Pac. 694].)

Judgment reversed.

Finlayson, P. J., and Thomas, J., concurred.

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[Civ. No. 2678. Second Appellate District, Division Two.—April 30, 1920.]

**S. KINDERMAN, Respondent, v. VIRGINIA SHIPLEY,  
Appellant.**

- [1] **JUDGMENTS—BREACH OF LEASE—ACTION FOR DAMAGES—CROSS-ACTION FOR BREACH—PREVIOUS ADJUDICATION—ESTOPPEL.**—In an action for damages for breach of a covenant to pay rent, the defendant is estopped to set up as a defense and cross-action for damages that after the execution of the lease the plaintiff closed up one of the main entrances to the premises from the public street, thus greatly reducing the value of the use of the premises, and destroying the profits of defendant's leasehold, where the identical issue of fact was presented in a previous action between the parties in a justice's court to recover one month's rent and on a trial *de novo* in the superior court that issue was determined adversely to the defendant.
- [2] **ID.—RES ADJUDICATA.**—A former judgment between the same parties is conclusive not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question.
- [3] **APPEAL—FAILURE OF APPELLANT TO PRINT RECORD.**—Under the amendment of 1919 to section 953c of the Code of Civil Procedure, the omission of an appellant to print in her brief or in a supplement thereto such portions of the record as she desires to call to the attention of the court does not permit of a dismissal of the appeal.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

E. V. Chavez for Appellant.

L. A. Lewis and Haas & Dunnigan for Respondent.



SLOANE, J.—The plaintiff brought this action to recover from the defendant \$940 accrued rentals under a lease by plaintiff to defendant of a rooming-house in the city of Los Angeles. Defendant admitted the execution of the lease, and that the rental was unpaid, but denied liability, and sought to recover damages upon her counterclaim. The defense and cross-action is based upon the alleged fact that after the execution of the lease for a term of years the plaintiff closed up one of the main entrances to the premises from the public street, thus greatly reducing the value of the use of the premises, and destroying the profits of defendant's leasehold.

[1] On the trial before a jury the court instructed the return of a verdict for plaintiff, and against the defendant on her counterclaim, upon the introduction of the judgment-roll in a former action between the same parties, upon the same lease, and in which the same facts were pleaded by way of defense, with findings and judgment against the defendant.

The sole question presented on this appeal is as to the correctness of the holding of the trial court that the issue of fact raised by defendant's answer and cross-complaint was *res judicata*.

The former action was brought in a justice's court to recover one month's rent under the lease, for the sum of ninety dollars. Judgment was against the defendant, who appealed to the superior court, and a trial *de novo* was there had. The issue raised by the answer was pleaded as follows: "2. Defendant further answering and for defense herein alleges that at the time said agreement was entered into and she took possession of said premises from North Main Street, which was the main entrance to the same, the same being designated as No. 337 No. Main Street, as set out in said agreement, which fact was the reason for defendant entering into said agreement, but that after defendant had so entered into said agreement and had taken possession of said premises, and against the will and protests of said defendant said entrance was wrongfully closed up and taken out by plaintiff or his lessor, which was a breach of the conditions of said agreement, and said entrance was made into a store on the ground floor and rented to other parties. 3. That the defendant depended and relied in entering into

said agreement entirely upon the fact that the said premises had said entrance to said Main Street, the other entrance to same to New High Street being obscure and in the rear of said building. 4. That by reason of said Main Street entrance having been so abandoned and taken out, the said agreement became forfeited, inoperative, and void, and the defendant became greatly damaged and the said premises became entirely worthless and ruined and worthless for the purpose for which the same were leased, and that by reason thereof defendant did, and was compelled to vacate and surrender the same to plaintiff." In its decision against defendant the superior court found that prior to the negotiations of the lease in question there had been an entrance to the premises in question as alleged by defendant, but that during the negotiations leading up to the execution of the lease such entrance to the premises was being closed, and that certain employees of the plaintiff were engaged in closing up this entrance and removing the stairway leading from Main Street into the said premises; that prior to the time of the execution of said lease the entrance had been closed and abandoned, and the stairway removed; that in the execution of the lease the parties to the lease, being the plaintiff and defendant, contemplated and understood that there was to be no entrance to said premises from Main Street; and that at the time the lease was executed and defendant entered into possession of the premises there was no entrance from Main Street. The court further found that the allegations of paragraphs 2, 3, and 4 of the answer herein set forth were untrue; and that the defendant, with full knowledge that said entrance did not exist, and for the purpose of ratifying the lease, caused the lease to be acknowledged, and thereafter placed it of record in the records of Los Angeles County. The defendant thereafter abandoned the premises and defaulted in all further payments of rent, and this action was brought some two years later by the plaintiff to recover damages in the sum of \$940 for breach of the covenant to pay rent. The defendant, by way of defense and counterclaim, set up, in substantially the same language as in the defense to the former action, the facts there alleged as to the existence and subsequent closing of the Main Street entrance, and claimed damages in the sum of \$17,700.

We think it is clearly apparent that the defendant is estopped by the former decree and judgment from setting up this defense and cause of action on counterclaim. It is true that the relief sought here by defendant is not precisely the same as in the former action, but the right of defendant to relief depends upon precisely the same issue of facts that was tried in the former case and determined adversely to defendant's contention. The question of debarring defendant's right to plead a counterclaim in the present case because of not having presented such claim in the former trial is not involved. It is merely that the issue of fact which she now relies upon for her defense and recovery of damages has heretofore been tested and adjudged untrue in a trial by a competent court between the same parties; and the law declares that as between the parties that question was settled once for all. [2] "A former judgment between the same parties is conclusive not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question." (*Bingham v. Kearney*, 136 Cal. 177, [68 Pac. 597]; *Southern Pac. Co. v. Edmunds*, 168 Cal. 418, [143 Pac. 597]; *Curtis v. Upton*, 175 Cal. 331, [165 Pac. 935]; *Koehler v. Holt Mfg. Co.*, 146 Cal. 337, [80 Pac. 73].) The last case cited is particularly in point on the issue here.

[3] Respondent calls attention to the fact that this appeal is brought under the alternative method, and that the appellant has failed to print in her brief or in a supplement thereto such portions of the record as she desired to call to the attention of the court. Such omission, under the amendment of 1919, [Stats. 1919, p. 261] to section 953c of the Code of Civil Procedure, does not permit of a dismissal of the appeal; and we find it preferable to examine the typewritten record rather than require a supplement to be prepared.

The judgment is affirmed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 2072. Third Appellate District.—April 30, 1920.]

A. O. DAMAN, Appellant, v. JOHN WESLEY HUNT, Jr.,  
Defendant; H. W. REYNOLDS, Assignee, etc., Re-  
spondent.

- [1] **INSOLVENCY ACT OF 1880—JURISDICTION OF SUPERIOR COURT.**—A superior court, in proceedings in insolvency under the Insolvency Act of 1880, exercises a special or limited jurisdiction; and everything required by that act to give said court the jurisdiction to hear and determine the same or to act in the proceedings must be made affirmatively to appear in the record. If any jurisdictional fact appears, upon the face of the record, to be wanting, the court is wholly without jurisdiction to act or to make any valid order or adjudication in the proceeding.
- [2] **ID.—ACTION TO QUIET TITLE—SUFFICIENCY OF COMPLAINT.**—In this action to quiet title, the amended complaint in intervention by the substituted assignee in the matter of an insolvent debtor, under the Insolvency Act of 1880, stated a cause of action, and the general demurrer thereto was properly overruled.
- [3] **ID.—APPOINTMENT AND QUALIFICATION OF ASSIGNEE—ADMISSION BY FAILURE TO DENY.**—The amended complaint in intervention having alleged the appointment and qualification of the assignee, and that allegation not having been denied, it was in legal effect admitted.
- [4] **ID.—VACANCY IN OFFICE—CONVEYANCE OF PROPERTY TO SUCCESSOR.** Where, after the property of the insolvent debtor was conveyed to the assignee "and to his successor and successors in office," the office of assignee became vacant and such vacancy was regularly supplied by the appointment of another to discharge the duties of the office, it was not necessary or requisite that there should be a specific assignment or conveyance of the property of the insolvent's estate to such successor or successors.
- [5] **ID.—DISMISSAL OF PROCEEDINGS—ABSENCE OF CONSENT—VOID ORDER.**—An order dismissing insolvency proceedings which shows upon its face that it was made without the consent of all parties interested in or affected thereby is void.
- [6] **ID.—POWER TO SET ASIDE VOID ORDER.**—An order dismissing insolvency proceedings without the consent of all parties interested in or affected thereby being void, a court making such an order may vacate and set aside the same.
- [7] **ID.—CONVEYANCE OF PROPERTY TO ASSIGNEE—SUBSEQUENT DEED BY INSOLVENT—VALIDITY OF.**—After the property of the insolvent debtor has been conveyed to the assignee and to his successor and successors in office, a deed of conveyance of the property by the insolvent debtor to a stranger to the insolvency proceedings is

void, notwithstanding that prior to such attempted conveyance the court, acting in excess of its jurisdiction, ordered the insolvency proceedings dismissed.

- [8] **ID.—FAILURE OF ASSIGNEE TO FILE BOND—VALIDITY OF CONVEYANCE BY.**—Where the original assignee, in proceedings in insolvency under the Insolvency Act of 1880, dies and a successor is regularly appointed by the court but he fails to file a bond as assignee, as required by the act, he is without authority to exercise the duties of his office, and a conveyance by him of the property of the insolvent debtor which was conveyed to the original assignee, is void.
- [9] **ID.—DELAY IN PROSECUTION OF PROCEEDINGS—ABANDONMENT OF PROPERTY.**—After the real property of the insolvent debtor is conveyed to the assignee, the fact that the administration of the estate of the insolvent remains in abeyance or is dormant because the proceedings in insolvency are not promptly prosecuted to a final determination does not of itself constitute an abandonment of such real property as a part of the assets of the insolvent estate to be subjected to the extinguishment of the liabilities of the insolvent.
- [10] **ID.—ABANDONMENT—QUESTION OF FACT—INTENTION—BURDEN OF PROOF.**—In such a case, the question of abandonment is one of fact to be determined by the jury or the court, if the issues of fact are tried by the court, and the burden is upon the person relying upon an abandonment of the property to show that there was an intention in the assignee to abandon the property.
- [11] **ID.—ACTION BY INTERVENER TO QUIET TITLE—STATUTE OF LIMITATIONS.**—In an action to quiet title by the grantee of an insolvent debtor, a complaint in intervention by the assignee of the estate of such insolvent debtor to quiet title to the property in question as against the parties to the original complaint and in favor of the intervener, in effect, is for the recovery of real property, and the time within which such complaint in intervention should be commenced is governed by section 318 of the Code of Civil Procedure.
- [12] **ID.—APPOINTMENT OF ASSIGNEE TO RECONVEY TO INSOLVENT—VOID ORDER.**—An order, made after the death of the original assignee, appointing an assignee for the limited purpose of making a conveyance to the insolvent of the property conveyed to the original assignee is unauthorized by the Insolvency Act of 1880, and, therefore, void. (Opinion of supreme court on denial of hearing.)

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. J. Mitchell and Chas. H. Brock for Appellant.

J. H. Creighton for Respondent.

HART, J.—Plaintiff brought the action to quiet his title to certain lots in the town site of Howard, in the county of Los Angeles. Judgment was in favor of plaintiff for a portion of said lots and in favor of the intervener as to the balance thereof. Plaintiff prosecutes this appeal from that portion of the judgment which was in favor of the intervener, no question arising herein as to the other lots.

The complaint was filed on September 23, 1915, and was in the usual form, alleging that defendant, Hunt, claimed some interest in the real property adverse to plaintiff. On February 16, 1916, H. W. Reynolds, as assignee in the matter of Jeremiah W. German, an insolvent debtor, filed a complaint in intervention.

The findings of the court present fully certain facts of the case. They are as follows: (2) That, on the thirty first day of July, 1888, Jeremiah W. German was the owner in fee and was in possession of the lots in controversy; (3) that on said day said German filed his petition in voluntary insolvency in the superior court of the county of Los Angeles and that he was duly adjudged an insolvent; (4) that at a meeting of the creditors of said insolvent, Jacob Baruch was chosen assignee in said insolvency matter and duly qualified as such assignee; (5) That in the schedule attached to the petition of said insolvent was the real property involved herein; (6) that verified claims were filed against said insolvent estate to the amount of \$4,907.09, which were duly allowed by the court and are now unpaid, except that there was paid thereon the sum of 7.1046 cents on each dollar thereof, received from the sale of the personal property belonging to the insolvent; (7) that, on the 8th of September, 1888, the county clerk deeded said real property to the assignee, Jacob Baruch, and to his successor or successors in office; (8) that said assignee, Jacob Baruch, died about January 1, 1909; (9) that, about the 28th of February, 1912, the court, "without any notice to creditors or to anyone else interested in said insolvency proceedings, made the following order in said proceedings, to wit: 'This cause coming on to be heard upon the application of Jere-

miah W. German, the insolvent debtor, . . . for an order dismissing this action for want of prosecution, and it appearing . . . that no proceedings have been had therein for a period of more than twenty years, . . . It is ordered that the said action be, and the same is hereby dismissed for want of prosecution'"; (10) that on or about the seventh day of June, 1912, the court, "without any notice to creditors, or to anyone else interested in said insolvency proceedings, made the following order: 'It appearing to the court' that said order dismissing the action 'was inadvertently made in this, that said order does not provide for the disposition of the undisposed property heretofore conveyed to the assignee' of the estate of said insolvent, 'It is therefore ordered that the said order of dismissal be and the same is hereby canceled and set aside and the court hereby assumes jurisdiction of said cause for the purpose only of taking such further action therein as may be necessary and proper in the furtherance of justice; and it further appearing to the court that there is certain real estate heretofore conveyed to Jacob Baruch as assignee in this cause . . . and that no disposition has been made of said real estate by the said assignee; . . . that by reason of the death of the said Jacob Baruch . . . a vacancy exists and that there is no person qualified to act herein; . . . that no successor to said Jacob Baruch as assignee has been appointed and that by reason of the want of prosecution of said action the said assignor . . . is entitled to a dismissal thereof and to a reconveyance of any undisposed of property herein; that said German has conveyed to one A. O. Daman, by deed dated March 5, 1912, . . . an interest in and to the said undisposed of real estate; it is therefore ordered that James H. Blanchard be and he is hereby appointed as assignee in this cause, without bond, for the purpose only, and he is hereby directed to convey to A. O. Daman, as grantee of Jeremiah W. German, the undisposed of real estate heretofore conveyed to Jacob Baruch,' " etc.; (11) that on or about the 28th of February, 1917, said court vacated the portion of the last-above quoted order which appointed said Blanchard special assignee, and appointed H. W. Reynolds as assignee with bond of one thousand dollars; (12) that the said German gave a quitclaim deed, dated March 5, 1912, to A. O. Daman, to the property in question; (13) that on or about the

seventh day of June, 1912, the said Blanchard, acting as special assignee, gave a deed to said property to said Daman, purporting to convey the title from the estate of said insolvent, "but the said James H. Blanchard had not qualified as said assignee . . . and never did qualify as such assignee, and no order had been obtained for the making of said transfer, save and except the order" set out in finding 10, "and no notice of sale had been given" or obtained, "and no sale had been made of said property, and no consideration for said deed passed to the said assignee, . . . and the estate of said insolvent and the creditors therein did not . . . at any time receive any consideration for the said transfer of said property," and no notice to creditors was ever given of the intention to make said transfer; (14) that the creditors first obtained knowledge of the making of the orders set out in findings 9 and 10 about the first day of November, 1915; (15) that, about the tenth day of June, 1912, A. O. Daman gave to Frank P. Stedman a grant deed to said property, the consideration recited in said deed being one thousand dollars; (16) that, about the seventh day of September, 1915, Stedman gave to Daman a grant deed to said property, the consideration recited in said deed being ten dollars; (17) that in the account of the assignee, Jacob Baruch, filed July 9, 1889, said Baruch reported to the court that the real estate in question was undisposed of, for the reason "that the said assignee was unable to find purchasers therefor, and that upon the twenty-second day of July, 1889, this court audited and settled the account of said assignee."

The points made by the appellant for a reversal are thus specifically stated in the brief of the respondent:

"1. That the demurrer to respondent's amended complaint should have been sustained; 2. That there is no evidence to show that Jacob Baruch was ever appointed assignee or ever qualified as such in the insolvency proceedings of Jeremiah W. German, or that the property here involved was ever assigned to him, or that respondent was ever appointed assignee in such insolvency matter or ever qualified as such, or that the property in question was ever assigned to him; 3. That the findings of fact and conclusions of law do not support the judgment; 4. That the intervener could not make a collateral attack on the orders



made in the insolvency proceedings for the reason that the superior court when sitting as an insolvency court is a court of general jurisdiction; 5. That the order of dismissal made in the insolvency proceedings was a valid order and disposed of all of the interest which the assignee or creditors might or could have had in the property here involved and put the property back in Jeremiah German just the same as if no insolvency proceedings had been had; 6. That the order setting aside and vacating the order of dismissal did not set aside and vacate it, and if any of the order setting aside and vacating the order of dismissal is void, it is void *in toto*; 7. That the property here involved was abandoned by the assignee in the insolvency proceedings; 8. That the intervener is barred from bringing this action by the statute of limitation; 9. That by reason of the great lapse of time since the insolvency proceedings were instituted, all the claims, debts, liabilities, or demands against Jeremiah German on July 31, 1888, being the time when said insolvency proceedings were commenced, must be deemed to have been discharged; 10. That appellant was an innocent purchaser of said property; 11. That James H. Blanchard was the legally appointed and qualified assignee in the insolvency matter."

It is deemed proper first to examine and present herein such of the provisions of the Insolvency Act of 1880 (Stats. 1880, p. 82), under which the insolvency proceedings involved herein were instituted, as have direct pertinency to the inquiry submitted by this appeal.

The first, second, third, and fourth sections of said act pointed out the manner in which an insolvent debtor might as a voluntary insolvent, petition the superior court to be discharged from his debts and liabilities, and provided that annexed to his petition there should be a schedule of his debts and liabilities, which should contain a full and true statement thereof, and an inventory containing a description of all his estate, both real and personal. The fifteenth section provided for the election by the creditors of an assignee to take charge of and administer the insolvent's estate. Said section also provided that the assignee so elected should, within five days after his election, file with the clerk of the court a bond, in an amount fixed by the court, with two or more sufficient sureties, approved by the court, and con-

ditioned for the faithful performance of the duties devolving upon him. The court could, however, upon a proper showing, extend the time for filing such bond beyond the five days' limit specified in said section for said purpose.

Section 25 of the act provided as follows: "The assignee shall, as speedily as possible, convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid, unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made." (See, also, subd. 4, sec. 21, of said act.)

Section 58 of the act provided: "Pending proceedings by or against any person, copartnership, or corporation, no statute of limitation of this state shall run against a claim, which in its nature is provable against the estate of the debtor."

Section 66 of said act provided: "The court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of assignee. After the appointment of the assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby."

[1] It is settled that the superior court, in proceedings in insolvency, exercises a special or limited jurisdiction. It follows, therefore, that everything required by the insolvency statute to give said court the jurisdiction to hear and determine the same or to act in the proceedings must be made affirmatively to appear in the record. If any jurisdictional fact appears, upon the face of the record, to be wanting, then the court was wholly without jurisdiction to act or to make any valid order or adjudication in the proceeding.

In the case of *McDonald v. Katz*, 31 Cal. 167, the court said, referring to insolvency proceedings: "The proceedings are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon that question must appear affirmatively," citing *McAllister v. Strode*, 7 Cal. 430; *Judson v. Atwill*, 9 Cal. 478; *Meyer v. Kohlman*, 8 Cal. 47; *Swain v. Chase*, 12 Cal. 283. (See, also, *Key-stone Driller Co. v. Superior Court, etc.*, 138 Cal. 738, 742, [72 Pac. 398].)

By the rules stated in the foregoing cases the points as to the jurisdiction of the court to make the several orders referred to must be considered and determined.

[2] 1. The demurrer to the amended complaint in intervention was general and was properly overruled. That pleading states the facts as they are substantially hereinabove reproduced. It is not necessary to examine in detail herein the averments of said complaint and we shall not attempt to do so, since the facts as they are above stated show that, as embraced in the complaint, a cause of action is stated.

[3] 2. As to the point that there was no evidence showing that Jacob Baruch was duly appointed and the qualified assignee in the insolvency proceedings, a ready and conclusive reply is found in the fact that the appellant failed to deny the allegation in the complaint of Baruch's appointment, etc., and so in legal effect admitted that fact. The complaint in intervention alleges the appointment and qualification of Baruch as assignee, and also that the clerk of the superior court, on the eighth day of September, 1888, deeded and assigned to said Baruch, as assignee, etc., and to his successor and successors in office all of the property, real and personal, belonging to the insolvent, Jeremiah W. German, except such property as was by law exempt, said deed and assignment having been duly recorded. There was no denial of these averments, and, as above stated, the facts so averred, therefore, stand as having been admitted. Nor was there any denial in the answer of the averments of the complaint in intervention that the court set aside and vacated the order appointing James H. Blanchard as assignee and declared the office of assignee vacant, and thereupon appointed H. W. Reynolds (intervener and respondent) as such assignee and that said Reynolds "ever since has been,

and now is, the duly appointed, qualified and acting assignee in the said insolvency matter," etc.

It requires the citation of no authorities to confirm the obvious proposition that where certain vital ultimate facts alleged in a complaint are not denied by the adversary party in his pleading such facts are to be deemed admitted, and that in such case it is not necessary to introduce evidence extrinsic to the pleadings themselves to support such facts. [4] But, in this connection, it may be noted that counsel for appellant contend that there is neither allegation nor proof that the property was *assigned* to the intervener. This contention cannot be maintained. The undenied allegation of the complaint in intervention is, as we have seen, that the clerk of the court, upon the filing of the petition in insolvency and the adjudication following therefrom that German was an insolvent debtor, deeded and assigned to said Baruch, the original assignee, "and to *his successor and successors in office*, all of the property, real and personal, then belonging to the said Jeremiah W. German," etc. It follows, of course, that the office of assignee having become vacant and a successor to Baruch having been regularly appointed and qualified, such successor thereupon immediately became vested with the right to the possession of all the property belonging to the insolvent estate by virtue of the assignment and conveyance to Baruch. We have found no provision in the insolvency law to the effect that, where the office of assignee has become vacant and the vacancy has been regularly supplied by the appointment of another to discharge the duties of the office, and where the property of the insolvent estate had already been assigned and conveyed to the original assignee and his "successor and successors in office," it is necessary or requisite that there should be a specific assignment and conveyance of the property belonging to the insolvent's estate to such successor or successors. We, therefore, conclude that it was not necessary to plead and prove that the clerk directly assigned and conveyed the property to Reynolds, Baruch's successor.

[5] 3. The order dismissing the insolvency proceedings showed upon its face that the court was without jurisdiction to make said order, and that the same was absolutely void. The petition for the order of dismissal and the order constitute the entire record of the proceeding wherein the

order dismissing the proceedings was made, and it appears therefrom that the petition was filed on the twenty-eighth day of February, 1912, and that the order of dismissal was made on the same day. As will be observed, section 66 of the Insolvency Act, above quoted herein, provided that after the appointment of an assignee in insolvency, no dismissal of the petition in insolvency and discontinuance of the insolvency proceedings should be made and ordered without the consent of all parties interested in or affected thereby. It was not made to appear upon the face of the petition to dismiss or in the order of dismissal or otherwise that the consent of the parties interested in or affected by the insolvency proceedings had been obtained for a dismissal and discontinuance of the proceedings in insolvency. The consent of the parties interested in the proceedings involved a jurisdictional fact. The court was absolutely powerless to make an order of dismissal and discontinuance of the proceedings in the absence of a showing of that fact, and its act in making the order under such circumstances was *coram non judice*. Moreover, since the superior court was in insolvency proceedings vested only with a special or limited jurisdiction, no presumptions or intendments can be indulged in favor of the validity of the order. It was necessary that the consent of all interested parties should be made to appear upon the face of the proceeding to dismiss to render the order immune from collateral attack. As above intimated, there was no showing nor any attempt to show by evidence *dehors* the record of the proceeding to dismiss that the consent of the interested parties to a dismissal and a discontinuance of the insolvency proceedings actually was had, assuming that it would have been proper thus to have made such a showing.

[6] 4. It was, of course, proper for the court to set aside and nullify its order dismissing the insolvency proceedings. As above shown, the court was wholly without authority or jurisdiction to make the order of dismissal and discontinuance, and there was, therefore, left to it no other alternative but that of vacating said order and thus getting it out of the way and so preventing complications which would necessarily arise in the insolvency proceedings by reason of said order. [7] The deed of conveyance of the property by German to the appellant was, of course, absolutely void.

It conveyed nothing. The unauthorized dismissal of the insolvency proceedings—unauthorized because the court was without jurisdiction to dismiss the proceedings—did not have the effect of nullifying the proceedings. They still were pending in contemplation of law, and, of course, the insolvent was not legally reinvested with title to the property which had belonged to the estate and which had been conveyed for the purposes of administration of the estate to the assignee and his successor and successors in office. And the fact that appellant, having conveyed the property to one Stedman after German, in the interval between the dismissal and the restoration of the insolvency proceedings, had made a purported conveyance of the property to the appellant, received a conveyance back of the property from said Stedman could not have the effect of vesting any greater title in the appellant than he was able to convey to Stedman. In other words, having obtained no title from German the appellant could convey none to Stedman, and, therefore, the latter had no title he could convey when he made the purported reconveyance to the appellant.

It was also proper for the court, upon vacating the order of dismissal and thus reviving the proceedings, to appoint an assignee to take charge of and administer upon the remaining undisposed of assets of the insolvent's estate, since there was a vacancy in that office by reason of the death of the original assignee. [8] The appointment of James H. Blanchard as assignee to succeed Baruch, assignee, was regular. But Blanchard failed to file a bond as assignee, and he was, therefore, without authority to exercise the duties of his office or to perform a valid act as assignee until he filed such bond. It follows that the conveyance by him of the land in controversy to the appellant involved a void act. It was wholly without legal force or effect. Counsel for the appellant vigorously contend, however, that the mere appointment of Blanchard vested him with all the powers of an assignee or a trustee and that he could act or perform the duties of the office without giving or filing a bond conditioned for the faithful discharge of his duties as such assignee. We are unable to concur in that contention. As above shown, the Insolvency Act (sec. 15) provided that the assignee, within a certain specified time, or within any further time which the court might allow for meeting that re-

quirement, should file a bond conditioned for the faithful performance of the duties devolving upon him. It is true that section 15 of said act does not expressly declare that the filing of the bond should be a prerequisite to his right to exercise his authority as assignee, but it certainly meant that such was to be the case. If the assignee could go on and legally administer the insolvent estate without filing the bond required, what could have been the object of the legislature in requiring a bond at all? The assignee derived his title to the insolvent's estate from the assignment, which divested the insolvent of his property and vested it in the assignee from the time of the insolvency. Both the insolvent and the creditors are interested in the estate and are entitled to have its assets administered according to the best interests of all concerned. The insolvent is interested in having his liabilities as far extinguished by the assets of his estate as possible and the creditors are interested in having their claims as nearly satisfied in full as the condition of the estate will permit. Hence, it was a wise provision that one having cast upon him so important a trust should be required to file a sufficient bond conditioned for the faithful performance of the trust, and we entertain no doubt that the requirement that an assignee in insolvency should file a bond for that purpose was intended by the legislature as an essential requisite for his qualification to exercise or perform the duties of that office. At any rate, it has been so held in a number of cases, among which may be mentioned the case of *Winchester v. Union Bank of Maryland*, 2 Gill & J. (Md.) 79, [19 Am. Dec. 255]. Furthermore, the order appointing Blanchard limited his authority as assignee to the performance of the act of making a conveyance of the property in dispute to the appellant. That portion of the order was absolutely void, since it does not appear therefrom or from anything in the proceeding culminating in his appointment that a petition was filed praying for the sale or disposal of the property by private sale. Section 25 of the Insolvency Act provided that "no private sale of any property of the estate of an insolvent debtor shall be valid unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary." And the same section provided that upon the filing of a petition for such a sale notice of at least ten days

should be given by publication, etc. The order appointing Blanchard as assignee and the order authorizing him to convey the property to the appellant was, as we have seen, practically one order and both were made on the same day.

Thus it is manifest that there it not only not any showing that a petition was presented to the court asking for a private sale, but that it was absolutely impossible for any notice whatever, much less the required notice of ten days, to have been given of such sale, assuming, of course, that the conveyance to the appellant involved a sale by the assignee.

[9] And this brings us to the question, raised by the appellant, that the right to subject the land in controversy to the payment of the debts of the insolvent was lost by reason of the fact that said land had been abandoned by the assignee. But there is no merit to the point. The complaint of the intervener alleges that said property was taken possession of by the original assignee, Jacob Baruch, the same having been assigned and conveyed to him by the clerk of the superior court. This allegation is not denied by the answer to the complaint in intervention and therefore stands as admitted. The fact that the administration of the estate of the insolvent remained in abeyance or was dormant because the proceedings in insolvency were not promptly prosecuted to a final determination did not constitute an abandonment of the property as part of the assets of the insolvent estate to be subjected to the extinguishment of the liabilities of the insolvent. The rule of law as to abandonment is that there is no presumption of abandonment from mere lapse of time. (*Partridge v. McKinney*, 10 Cal. 181. See, also, *Utt v. Fry*, 106 Cal. 352, 398, [39 Pac. 807], as to what will and will not constitute the abandonment of property.) In the present case, there could be no abandonment except by the assignee in whom the title to the property for the purposes of the insolvency proceedings had been vested. There is no evidence tending to show that Baruch abandoned or intended to abandon the property, save and except the fact that he failed to sell it during his incumbency as assignee and appropriate the proceeds of the sale to the payment of the debts of the insolvent. This omission may be assumed to have involved a dereliction of official duty on the part of Baruch rather than an abandonment, since it does not appear that the property was not



of sufficient value to have justified the expense of selling it for the benefit of the insolvent's estate.

Appellant cites a number of cases which it is claimed support the view that the property herein involved was abandoned and therefore the right to appropriate it to the payment of the debts of the insolvent lost; but we have examined the cases and do not perceive that they are in point here. The property belonged to the insolvent's estate and it was available for disposition by the assignee in insolvency. No claim was ever made that it was abandoned or that there was an intention to abandon it as a part of the insolvent's estate until the void order was made, at the instigation of the insolvent, dismissing and discontinuing the insolvency proceedings, when the insolvent himself undertook to re-take possession of it and convey it to the plaintiff. [10] The question of abandonment is one of fact to be determined by the jury or the court, if the issues of fact are tried by the court, and the burden was upon the plaintiff clearly to show that there was an intention in the assignee to abandon the property. (*Latham v. City of Los Angeles*, 87 Cal. 514, 518, [25 Pac. 673].) The finding of the court in this case that there was no abandonment is conclusive upon this court.

[11] 5. The contention that the action, in so far as it is made by the complaint in intervention, is barred by the statute of limitations is without force. The complaint of the intervener is one for the quieting of title to the property in dispute as against the plaintiff and the defendant and in favor of the intervener, or, in effect, is for the recovery of real property, and the claim that the intervener's claim is barred proceeds upon the theory that the action, as to the time within which it should have been commenced, is governed by section 338 of the Code of Civil Procedure. But it is manifest that that section does not apply to the intervener's case, but that section 318 of said code governs as to the time within which such an action may be commenced. Section 338 provides for the commencement of actions where the relief prayed for is based upon the ground of fraud, and that is not the ground of the relief asked for by the intervener. Section 318 provides that an action for the recovery of real property, or for the possession thereof, cannot be maintained "unless it appears that the plaintiff,

his ancestor, predecessor, or grantee, was seised or possessed of the property in question within five years next before the commencement of the action." The supreme court, in construing section 318, in *Murphy v. Crowley*, 140 Cal. 141, 146, 147, [73 Pac. 820, 821], says: "It seems to be established, therefore, by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is, that he be let into possession, or that his title to the land be quieted, his action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318. The same rule has been followed in the states of Iowa, Kansas, Missouri, and Texas. (*Williams v. Allison*, 33 Iowa, 278; *Reihl v. Likowski*, 33 Kan. 515, [6 Pac. 886]; *Dunn v. Miller*, 96 Mo. 338, [9 S. W. 640]; *Shepard v. Cummings*, 44 Tex. 502.) There is a case to the contrary in New York. (*Hoyt v. Putnam*, 39 Hun, 406.)

"Unless the decisions of this court above cited are to be overruled, it must be conceded that, although the wrong complained of, and undoubtedly the principal contest in the case, arises from the undue influence exerted by the defendant Crowley on her deceased husband in his lifetime, the action in question is nevertheless an action to recover real property and for the possession thereof, and is not barred by the provisions of section 318." (See, also, *Page v. Garver*, 146 Cal. 577, [80 Pac. 860].)

In the present case the first act which could start the statute of limitations to running, or could in any way impart to the intervener or the creditors of the estate of which the intervener became the assignee, information that the appellant claimed an interest in the property was the filing for record of the deed from German to the appellant, which act of recordation occurred on the eleventh day of March, 1912, or, as counsel for the respondent suggest, perhaps the act of the filing of the petition for a dismissal of the proceedings in insolvency and the making of the order of dismissal might have been the first acts indicating a claim of

interest in the property by parties other than the assignee, and the order of dismissal was made on the twenty-eighth day of February, 1912. The intervenor's amended complaint, upon which the action was tried, was filed on the eleventh day of March, 1916, within the five years' limitation prescribed by section 318 of the Code of Civil Procedure. It is, therefore, manifest, as stated, that the intervenor's action is not barred.

6. The point that "because of the lapse of time since the filing of the petition by the said Jeremiah W. German to be adjudged an insolvent debtor, the presumption exists that all claims, debts, liabilities, and demands that were valid claims against said petitioner on July 31, 1888, have been paid and discharged," is conclusively answered by section 58 of the Insolvency Act, above quoted herein, that no statute of limitation of this state shall run against a claim which, in its nature, is provable against the estate of the debtor.

7. It is claimed that the findings of fact and conclusions of law do not support the judgment. It is not necessary to reproduce herein the findings of fact and the conclusions of law to show that this contention has no foundation. It is sufficient to say that we have carefully examined the findings and the conclusions of law and that we have concluded from said examination that the judgment derives ample support from them.

There are numerous other points made by the appellant in impeachment of the judgment, but we have discovered no merit in them. We are satisfied that the judgment is legally impregnable and it is, accordingly, affirmed.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 28, 1920, and the following opinion then rendered thereon:

THE COURT.—In denying the petition for a hearing in this court after decision by the district court of appeal of the third appellate district we are not to be understood as approving that portion of the opinion substantially holding

that the ordinary presumptions and intendments applicable to judgments of courts of record are not applicable to judgments and orders of the superior court in insolvency proceedings. We think that here the order of the superior court dismissing the insolvency proceeding, and the subsequent order appointing Blanchard as assignee for the limited purpose of making a conveyance of the property to the insolvent, were manifestly void upon their face—the order of dismissal because it sufficiently appears on the face of the record that it was made without the consent of the creditors, [12] and the other order because no such appointment of an assignee is authorized by law. In view of this conclusion, we intimate no opinion upon the question of the effect of the failure of Blanchard to give a bond. In all other respects we are satisfied with the opinion of the district court of appeal.

The application for a hearing in this court is denied.

All the Justices concurred.

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[Civ. No. 3181. Second Appellate District, Division Two.—May 1, 1920.]

**RALPH ARNOLD, Respondent, v. LA BELLE OIL COMPANY (a Corporation), Appellant.**

- [1] **BROKER'S COMMISSIONS—CONTRACT OF EMPLOYMENT BY CORPORATION—PRIMA FACIE SHOWING.**—In an action against a corporation to recover a broker's commission, a document purporting on its face to have been signed by the president and the secretary of the corporation, and having attached thereto and impressed thereon the seal of the corporation, is entitled to admission as *prima facie* having been authorized and executed by the corporation.
- [2] **ID.—STATUTE OF FRAUDS—EMPLOYMENT OF AGENT—CONSTRUCTION OF CODE SECTION.**—Section 1624, subdivision 6, of the Civil Code does not require any formal contract but only that the fact of employment as agent or broker to sell real estate for compensation or a commission be expressed in writing, signed by the party to be charged, or by his agent.

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2. Right of broker to recover commission under oral contract of employment where statute requires written contract, notes, 13 Ann. Cas. 977; Ann. Cas. 1915A, 1133; 44 L. R. A. 601; 9 L. R. A. (N. S.) 933.

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- [3] **ID.—EXECUTION BY SECRETARY OF CORPORATION—COMPLIANCE WITH BY TEMPORARY APPOINTEE.**—Where a given instrument is required to be executed by the secretary of a corporation, execution thereof by a person appointed by the directors to act in the place of the regularly elected, qualified, or acting secretary is sufficient.
- [4] **ID.—PROCURING OF PURCHASER AT LESSER PRICE—RIGHT TO COMPENSATION.**—Where a broker procures a purchaser, not at the price specified in his contract of employment but at a lesser price, and the owner enters into an agreement of sale with such purchaser at such lesser price, under which agreement the latter enters into possession, the broker is entitled to the compensation agreed upon, according to his contract of employment.
- [5] **ID.—MODIFICATION OF PURCHASE AGREEMENT—RIGHTS OF BROKER NOT AFFECTED.**—The subsequent modification of such contract of purchase by mutual consent of the vendor and the purchaser would not affect the right of the broker to the compensation agreed upon in his contract of employment, and to which he was entitled when the vendor and the purchaser enter into the original contract of purchase.
- [6] **ID.—APPEAL — FAILURE TO ANSWER RESPONDENT'S STATEMENTS — ASSUMPTION.**—Where, in reply to the appellant's contention that the judgment of the trial court is erroneous, in so far as it found in favor of respondent the matters alleged in his supplemental complaint, the respondent states that it was the understanding of the trial court and himself that the stipulation of the appellant was that judgment as to those matters should follow the judgment on the matters alleged in the complaint, and such statement is neither answered nor denied, it will be assumed that the appellant concedes the truth of such statement and that the judgment of the trial court was proper.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Black & Black for Appellant.

E. S. Williams for Respondent.

THOMAS J.—The plaintiff seeks to recover the sum of \$4,362.43, claimed to be due and unpaid at the time of the commencement of this action, and the further sum of \$300,

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4. Right of broker to commission where less than stipulated price is accepted by owner, notes, *Ann. Cas.* 1913E, 784; *Ann. Cas.* 1914C, 138.

claimed to have become due, owing, and unpaid "subsequent to the filing of the original complaint herein and the commencement of this action, and prior to the date of trial," by virtue of certain of the terms of a written instrument, which, in words and figures, is as follows:

"January 15, 1912.

"Mr. Ralph Arnold,  
"700 H. W. Hellman Building,  
"Los Angeles, California.

"Dear Sir:

"Until further notice, or until the La Belle Oil Company has sold its property in the Midway Oil Field to some other person or persons, you are authorized by us to offer for sale to your clients the North  $\frac{1}{2}$  of the Southwest Quarter of Section 4, Township 32 South Range 23 E. M. D. B. & M. its 80 acres, more or less, at \$4,000.00 per acre, on such terms and conditions as we, i. e., yourself and ourselves may mutually agree upon, and in the event of your effecting a sale of our land in Section 4 (above described) or in the event of our effecting sale to any of your clients through your efforts or assistance, we agree to pay you five per cent (5%) commission on the total sales price, in the manner as and when paid to us.

"It is understood that this is not meant as an exclusive option, and in the event of our being able to make a *bona fide* sale before we might be able to serve notice on you of our desire so to do, and in the event such sale be made to some other person or persons than those we may have come in contact with outside of your efforts, you will agree that there be no commission due you except and alone where you have participated.

"If the above is a true and correct understanding of our agreement, kindly sign a duplicate of this, signifying your acceptance.

"Very truly yours,

"LA BELLE OIL COMPANY

"(Signed) W. P. CUNNINGHAM, President.

"Acting Secretary,

"W. P. THOMPSON,

"Corporate Seal of La Belle Oil Company.

"Approved Jan. 15, 1912.

"(Signed) RALPH ARNOLD."

By proper allegation it is shown that plaintiff has fully complied with the terms of the foregoing instrument.

There was a demurrer to the amended complaint, which was overruled. Except for the mere formal parts, and the fact that it admits that the amount claimed to be due has not been paid, etc., defendant's answer denies each and every material allegation of the complaint. On the issues thus presented the case was tried by the court without a jury. At the close of plaintiff's case defendant moved for nonsuit, which motion was denied. Judgment went for plaintiff for the amount of his commission of five per cent on the payments actually made to and received by the La Belle Oil Company prior to the commencement of the action, and also on the balance of \$6,000 "*which would have been paid prior to the trial if not impounded by the attachment herein.*" In short, the court found that all of the allegations of the complaint, as amended, as well as those of the supplemental complaint, were, and each of them was, true. The appeal is from the judgment so entered.

Finding No. II of the court reads as follows: "The court finds that while it is true that there was no express resolution of the board of directors of said corporation defendant authorizing said written agreement with said plaintiff, there were no meetings of the board of directors of said corporation defendant from September 17, 1910, to March 13, 1912, and that during the whole of that period, and including the time when said agreement with said plaintiff was made, the directors of said defendant conducted the business of said defendant by informal discussion and conference between all of the directors except one of them, to wit: F. E. Woodley, who did not give his attention to the affairs of said defendant corporation, and that at the time said agreement was made with said plaintiff and at all times thereafter all of said directors, excepting said Woodley, knew of and about said agreement and that the same was made on behalf of said defendant corporation by its president and secretary and discussed the same between them, and that said corporation did not, nor did any of its directors, at any time disavow said agreement or the execution thereof or dissent therefrom or claim to or notify said plaintiff that the same was not binding in any respect upon said defendant corporation; and the court further finds that said agreement with

said plaintiff was specifically, expressly and unanimously ratified in a written resolution of the board of directors of said defendant corporation at a regular meeting of said board held on June 12, 1912, at which a quorum of the directors of said corporation defendant was present and voting. The court finds that said agreement with said plaintiff or said plaintiff's agency was never terminated by notice or otherwise by said defendant."

It is urged by appellant here, as in the court below, (1) "that the instrument quoted in full above and which is designated in the record as plaintiff's exhibit 1, was not proven; that without proper authorization said exhibit was not the act of defendant, and that no evidence was offered to show authorization; (2) that appellant was entitled to judgment at the close of plaintiff's case"—in other words, errors of law occurring at the trial.

It is contended that the evidence is insufficient to show that Mr. Cunningham was president, or that Thompson was secretary, of the defendant company at the time of the execution and delivery by those parties of plaintiff's exhibit 1 to the plaintiff. The evidence on this point was by the plaintiff himself, which was that Mr. Cunningham, the president, and Mr. Thompson, the acting secretary of the La Belle Oil Company, signed plaintiff's exhibit No. 1 in his presence. Following this testimony the instrument was offered in evidence. To this defendant objected on the ground that it does not purport on its face to be authorized by the defendant corporation, and until the authorization be produced it is incompetent and immaterial. This objection was by the court overruled.

At the threshold of this matter it may be observed that the defendant's answer, so far as it refers to the allegations of the complaint, simply denies that the instrument in question was binding upon the defendant, for the reason that defendant never authorized its name to be signed or its seal attached thereto. By its answer defendant, in legal effect, admits the execution and delivery of the instrument to plaintiff by the officers of the defendant corporation, but denies that those officers had authority from it so to do.

[1] The evidence, as it stood at the time of the offer of the instrument in evidence, we think made a *prima facie* case. Indeed, the instrument, plaintiff's exhibit No. 1,



might have been introduced without the introduction of any preliminary oral evidence. Had such been the situation, a *prima facie* case to that extent would have been established, for the reason that the document on its face purported to have been signed by the president and secretary, and had attached thereto and impressed thereon the seal of the defendant corporation. Such a showing was sufficient to shift the burden of proof on defendant. (*McKee v. Cunningham*, 2 Cal. App. 684, [84 Pac. 260].) For these reasons we think this ruling correct.

[2] As supporting appellant's position, our attention is called to several decisions of the supreme court of this state, to wit: *Curtin v. Salmon etc. Co.*, 130 Cal. 345, [80 Am. St. Rep. 132, [62 Pac. 552]; *Pacific Bank v. Stone*, 121 Cal. 202, [53 Pac. 634]; *Blood v. La Serena etc. Co.*, 113 Cal. 221, [41 Pac. 1017, 45 Pac. 252]; *Salfield v. Sutter etc. Co.*, 94 Cal. 546, [29 Pac. 1105], and *Alta Silver M. Co. v. Alta Placer M. Co.*, 78 Cal. 629, [21 Pac. 373]; but we think none of these in point here. So far as applicable to the case at bar, section 1624 of the Civil Code reads as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: . . . 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission." We think no discussion is necessary to bring conviction that plaintiffs' exhibit No. 1 is at least a "memorandum in writing" such as will bring it within the purview of this section. It seems to have been the uniform holding of the supreme and appellate courts of this state that this section does not require any formal contract. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent. And the decisions of the supreme court of this state, as well as of this court, are in accord with the general rule on the subject in this country and England.

The question, therefore, with which we are confronted here may be put as follows: "Is plaintiff's exhibit No. 1 the contract of the corporation?" We have already stated that plaintiff has established, *prima facie*, that it was. Supplementing this, a witness offered by defendant in its own behalf—Mr. W. P. Cunningham—in response to the very first question asked, testified that he was the president of

the defendant corporation, and, in response to the second question, answered that he had been such "from its organization." In addition to this, we find in the record of the minutes of the board of directors of the defendant corporation, under date of June 12, 1915, that the following resolution was unanimously adopted: "Resolved, that whereas Ralph Arnold has acted in the matter of sale and transfer of the La Belle Oil Company's property as special representative in a special agreement with W. P. Cunningham and W. P. Thompson, he should receive a commission of five per cent (5%) on such deal as when paid to the La Belle Oil Company; therefore, be it resolved that the president and secretary are authorized to issue the company's check and pay the said Ralph Arnold five per cent on such amount as the La Belle Oil Company received from the California Counties Oil Company as and when received." The cases cited by appellant as supporting the contention that the exhibit in question is not the "contract" of the defendant corporation, as we have already intimated, are not in point, particularly in this: that when section 1624, *supra*, is construed with and in the light of sections 2309 and 2310 of the Civil Code—requiring an agent's authority to execute a contract in writing to be itself in writing—it does not, we think, apply to the executive officers of a corporation. "It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself. It was early decided that directors, though they are only agents of the corporation, are exempt from the rule which requires the authority of an agent to be in writing in order to vest him with power to execute a deed." (*McCartney v. Clover etc. Co.*, 232 Fed. 697, [1 A. L. R. 1127, 146 C. C. A. 623].) In the case just cited it is shown that "there are numerous authorities in which deeds and mortgages executed on behalf of corporations by executive officers without any resolution of the board or any authority in writing have been sustained." From this we think it must be obvious that plaintiff's exhibit No. 1 was the act of the corporation, irrespective of the fact that the name of the secretary, actual or

acting, might not have been appended, or the corporate seal attached thereto. [3] We think, too, that even were the foregoing condition a prerequisite to the execution of an instrument such as is before us, a showing that a particular person, although not the regularly elected, qualified, or acting secretary, but appointed by the directors to act in the latter's absence, executed such instrument in such capacity, would be a sufficient compliance with the requirement referred to. Therefore, even though such prerequisite authorization be essential—which, as we have seen, is not—and it were held that such authority was not given in the first instance, still, under section 2310, *supra*, the resolution which we have quoted is, in our opinion, a complete ratification of the action of the corporation's officers, as already set forth, and as such there can be no question but that the exhibit before us is the "contract" or "memorandum in writing" conferring authority to plaintiff to act on behalf of the corporation for the purposes set forth therein.

There is no attempt on the part of plaintiff to recover anything on the theory of *quantum meruit* or implied contract to pay for benefits. He is claiming under and by virtue of the specific terms and provisions of plaintiff's exhibit No. 1. By the terms of said exhibit it will be seen that plaintiff was authorized "to offer for sale . . . 80 acres, more or less, at \$4000 per acre, on such terms and conditions as we . . . may eventually agree upon." [4] Plaintiff procured a purchaser, not at \$4,000 per acre, or a total of \$320,000, but for the total sum of \$300,000—as will appear from plaintiff's exhibit No. 2. This was accepted by the defendant corporation on April 9, 1912, which entered into the agreement as set forth in plaintiff's exhibit 2 with the purchaser therein mentioned, viz., the California Counties Oil Company, a corporation, under which agreement the latter went into possession and did work upon the property. When this was done, plaintiff was entitled to the compensation agreed upon, according to the terms of plaintiff's exhibit No. 1. (*Brown v. Mason*, 155 Cal. 155, [21 L. R. A. (N. S.) 328, 99 Pac. 867]; *Boland v. Ashurst Oil etc. Co.*, 145 Cal. 405, [78 Pac. 871]; *Levy v. Wolf*, 2 Cal. App. 491, [84 Pac. 313]; *Justy v. Erro*, 16 Cal. App. 519, [117 Pac. 575]; *McMillan v. Beves*, 147 Fed. 218, [77 C. C. A. 444].)

[5] It is contended by appellant that the said California Counties Oil Company abandoned the latter contract. The evidence here does not support this contention. But it does appear that this contract or agreement was modified by mutual consent of the parties thereto on the twenty-eighth day of November, 1916, by which modification it is provided, among other things, that "it is hereby understood and agreed by all the parties hereto that the intent and purpose of this agreement is to cancel and set aside the agreement of April 9, 1912. . . . Should the said party of the second part [the California Counties Oil Company] fail to make the said payment . . . within ten days . . . then this agreement shall be of no effect, and shall immediately become null and void, and shall in nowise affect the said agreement of April 9, 1912." By this modification the price originally agreed to be paid—\$300,000—was reduced to and fixed at the sum of \$187,294.19. Of this amount the purchaser, the California Counties Oil Company, had paid to the defendant corporation, before the commencement of this action, the whole thereof, except the sum of \$6,000, and said defendant had paid the plaintiff a commission amounting to \$4,752.20, or five per cent on the sum of \$95,045.47. Thereafter, and before the commencement of this action, the said California Counties Oil Company paid said defendant the further sum of \$86,248.72, under and by virtue of the contract of April 9, 1912, as modified as aforesaid. No commission on this amount, or any portion of it, has ever been paid to plaintiff.

It is maintained by appellant that respondent was not entitled to commission on payments made to it under the said modification of plaintiff's exhibit No. 2, because "there is absolutely no testimony to show that respondent had anything to do with the execution of plaintiff's exhibit No. 3 [the modification agreement]." There is no merit in this contention. There is no reason shown why respondent should have had anything to do with it. As we have already seen, he was entitled to his compensation under plaintiff's exhibit No. 1, and according to the terms thereof. No subsequent agreement or modification of the original agreement between the vendee and the vendor therein could affect plaintiff's rights. Were it otherwise, the bars would be all down, and every agent who had rendered valuable service might, by such legerdemain as suggested here, be defrauded

not only out of a portion but out of the whole of the compensation agreed to be paid to him for procuring a purchaser of property.

By the terms of plaintiff's exhibit No. 1 plaintiff was to receive his said commission "in the manner as and when paid to us"—defendant. This is but another way of saying: "You are not to receive your five per cent on the whole of the purchase price when the deal is closed, but as fast as the purchaser pays in to us we will deduct the commission from such payment and remit to you." Indeed, this is all plaintiff contends for. The construction placed upon this phrase by defendant evidently is that in reality plaintiff was entitled to nothing until the full purchase price was paid, but that notwithstanding this the defendant had paid plaintiff the sum of \$4,752.20, although under no legal obligation so to do. With the facts before us we are unable to accede to any such construction. It is conceded by defendant that the sum of \$86,248.72 has actually been paid to it on account of the sale made originally to the purchaser who was brought to it by plaintiff, and that it has paid plaintiff no commission thereon. He is entitled to it, as found by the learned trial judge.

[6] It is next urged by appellant that "the judgment of the lower court includes commission on the sum of \$6,000 payments due but not yet made under exhibit 3. To reiterate, respondent's contract calls for commissions only 'in the manner as and when' payments are received by appellant. It is but idle speculation to say that the purchaser is able, willing, and ready to pay. It may or may not become insolvent before it does so. The fact is that no payment has been made, and commission dependent thereon is not due. The judgment of the lower court must be modified at least in respect to this item." In answer to this respondent claims that said \$6,000 became payable prior to the trial, "it being stipulated at the trial that the same would have been paid had it not been impounded by the attachment of the plaintiff herein. The matter is alleged in the supplemental complaint printed on page 15 and 16 of the supplement to appellant's opening brief. It was the understanding of the trial court and of ourselves that the stipulation of the defendant was that judgment might pass for the amount of the commission on this sum of \$6,000 as

well as on the other amounts already paid if the plaintiff was entitled to judgment at all, and we do not understand why counsel raises this question now." This statement of counsel for respondent is neither answered nor denied. Such being the case, coupled with the fact that the court actually found for the plaintiff on this item, as already seen, it will be assumed that appellant concedes the truth of such statement, and that the finding was proper. (*Colkins v. Doolittle*, 45 Cal. App. 776, [188 Pac. 601].)

No other point raised by appellant need be considered.

Judgment affirmed.

Finlayson, P. J., and Sloane, J., concurred.

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[Civ. No. 3194. Second Appellate District, Division Two.—May 1, 1920.]

CHESLEY MILLS, etc., Respondent, v. SAN DIEGO CONSERVATORY OF MUSIC (a Corporation), et al., Appellants.

[1] **TRADE NAME—INJUNCTION—SUFFICIENCY OF COMPLAINT—FINDINGS—EVIDENCE.**—In this action for an injunction to restrain the defendants from using and from conducting business under the name under which plaintiff had established and was conducting a school devoted to the art of music, and for damages, the complaint was sufficient as against a general demurrer, and the evidence was sufficient to sustain the findings of the trial court with reference to the deceit and fraud practiced by the defendants, other than the defendant corporation, upon the plaintiff by assuming and using the name under which the latter had been doing business.

[2] **ID.—PRIOR USE OF NAME—EQUITY.**—Where one has been first in the field doing business under a given name, courts of equity, in the interest of fair commercial dealing, will protect that person to the extent of compelling competitors to use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field.

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1. Necessity of fraudulent intent to justify injunction against unfair competition, notes, 3 ANN. CAS. 32; 4 L. R. A. (N. S.) 960.

- [3] **PLEADING—BREACH OF OBLIGATION BY DEFENDANTS—NATURAL RESULT—SPECIAL DAMAGE.**—The refusal of a music company to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music because of defendants' adoption in use of the same name as that under which plaintiff had been and was doing business constituted a special damage, compensation for which could be recovered only where such damage was specially pleaded.
- [4] **ID.—SPECIAL DAMAGE—FAILURE TO PLEAD—EVIDENCE INADMISSIBLE.**—Where special damage is not specially pleaded, the admission of evidence as to such damage, over defendants' objection, constitutes prejudicial error where it cannot be ascertained whether any such damages were allowed.

**APPEAL** from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Affirmed in part; reversed in part.

The facts are stated in the opinion of the court.

Henry C. Ryan and F. F. Grant for Appellants.

Sweet, Stearns & Forward and Stephen Connell for Respondent.

**THOMAS, J.**—This is an action for an injunction against the defendants, praying that the latter be enjoined from using the name "San Diego Conservatory of Music," and from conducting business under that name "or using the same in any manner whatsoever," asking for damages and for general relief. The relief is sought on the ground of unfair dealing on the part of the defendants.

The complaint, in apt and proper allegations, sets forth the acts complained of and because of which plaintiff seeks relief. A general demurrer was interposed to the complaint, and was by the court overruled. Defendants, by their answer, deny practically all the material allegations of the complaint, admitting, however, that defendants other than the corporation organized the defendant corporation, adopting said name therefor "for the purpose of engaging in the same character and line of business claimed to be carried on by plaintiff herein," the location of their business as alleged by plaintiff, and the publishing of certain advertisements; averring that only for the injunctive order of the court

they would have continued to carry on such business. The court found for the plaintiff on all the issues, and judgment was entered accordingly. There was a motion for new trial, which was denied. The appeal is from the judgment.

We have read the entire record. From the record it appears that the plaintiff, Professor Chesley Mills, during the year 1915 established a school devoted to the art of music in all its branches, including instruction in the playing of the piano, organ, violin, flute, cornet, mandolin, ukulele, and other orchestral instruments, together with voice culture, platform art, and dramatic training in general, and for the operation and management of a conservatory of music for such instruction and teaching, and the holding of public and private musicals and entertainments incident thereto, as well as the employment of teachers necessary to conduct and carry on such business; that at the time said business was so established the plaintiff adopted the name of "San Diego Conservatory of Music," under which name, since the establishment of said business as aforesaid, he has carried on and conducted the same at 1630 Fifth Street, in the city of San Diego; and that under said name plaintiff built up a large business, widely and favorably known, as well as a valuable reputation, etc. That in September, 1917, the defendants, other than the corporation, organized the defendant corporation, under the laws of this state, under the identical name adopted by plaintiff at the time and place aforesaid, and established the office of said corporation and studio at No. 1434 Fifth Street, in San Diego, "within eight hundred feet of plaintiff's said place of business, on the same side of the street," from which place and under which name defendants caused certain advertisements to be published; and that such business was so transacted by defendants from that time until restrained from so doing by the court. It is further alleged in the complaint that all this was done "with the intent and for the purpose of defrauding plaintiff and appropriating for their own use and benefit the goodwill of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at the aforesaid place was being conducted by defendants. . . . and that the same has actually misled many of them to patronize defendants in the



belief that they, the said persons, are patronizing the plaintiff," all to plaintiff's damage, etc.

Appellants enumerate eight assignments of error, which may be reduced to two; errors of law occurring during the trial, and insufficiency of the evidence to support certain findings.

[1] As to the first point urged, it is claimed that the court erred in overruling defendants' demurrer to plaintiff's complaint. With this we cannot agree. We think the complaint amply sufficient as against the general demurrer.

The next point urged is that the evidence does not support findings Nos. 4, 5, and 6. These findings, in full, are as follows:

"4. That said defendants, B. Roscoe Schryock, Florence M. Young, Mary Barnum Kessler, Edna D. Anderson, J. Wm. Brown, and Mrs. L. R. Kirby, Sr., caused the name of San Diego Conservatory of Music to be adopted as the name of said defendants' corporation with the intent and with the express purpose of defrauding plaintiff and appropriating for their own use and benefit the goodwill of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at 1630 Fifth Street in said city as aforesaid was conducted by said defendants, and that each and all of the said notices or advertisements placed by defendants in said newspapers as aforesaid were caused to be placed therein for the same purpose and with the same intent, and that if said defendants are permitted to carry on said business at said No. 1434 Fifth Street or elsewhere under said corporate name of San Diego Conservatory of Music that the prospective applicants for instruction and customers of plaintiff and the public in general will at all times be deceived, misled, and defrauded into believing that the place where defendants are so conducting business is plaintiff's place of business, all of which is and will be to the injury and damage of plaintiff and to the public in general.

"5. That unless restrained from so doing by this court, the defendants will continue and proceed to carry on the said business under the said name of San Diego Conservatory of Music for and with the express purpose of deceiving plaintiff's customers and the public in general into the belief that plaintiff's business conducted at its place aforesaid is

defendants' business; and that the name adopted by said defendants, to wit, San Diego Conservatory of Music, was at all times calculated and intended to receive the prospective applicants for instruction at plaintiff's said school or business, and the patrons and customers thereof together with the public in general; that by reason of each and all of the acts of said defendants herein so done or caused to be done by them and each of them, plaintiff has been injured and damaged in the sum of one hundred dollars.

"6. That the adoption of said name of defendant corporation, San Diego Conservatory of Music, was made with the intention or purpose of defrauding plaintiff and deceiving or misleading the public and to injure plaintiff, and that each and all of the acts of said defendants have created much confusion in plaintiff's said business. Plaintiff has fully complied with all the provisions of sections 2466-2468 of the Civil Code of the state of California relating to the use of fictitious names. That plaintiff having had the prior and exclusive right to said name of San Diego Conservatory of Music, the said defendants herein and neither of them have any right to use said name of 'San Diego Conservatory of Music' for the reason that the use of said name by defendants is of damage to plaintiff and his business and is calculated to mislead and deceive as hereinbefore set forth."

There is no merit whatever in the "point" that the evidence does not support these findings. Indeed, by the evidence of Mr. Schryock, director and head of the violin and piano department of the defendant corporation, it was shown that he knew, at the time of the incorporation of the defendant company, that plaintiff was conducting a business under that name, and instead of being open and aboveboard in his testimony, as one would be if acting wholly devoid of any ulterior motive, we see all through his testimony evidence of evasiveness and elusiveness, which, we think, amply justified the trial court in its observation that in its opinion this was a case of "rank fraud" on the part of the defendants. As we have already seen, plaintiff was first in the field doing business as above set forth. [2] "We think that in the interest of fair commercial dealing, courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of compelling competitors to use reasonable precautions to prevent deceit

and fraud upon the public and upon the business first in the field." (*Spieker v. Lash*, 102 Cal. 38, [36 Pac. 362]; *Dunston v. Los Angeles Van etc. Co.*, 165 Cal. 89, [131 Pac. 115]; *Temple v. Gordon*, 31 Cal. App. 127, [159 Pac. 983].) We think, too, that the fraudulent intent, as well as the deceit and fraud which defendants practiced upon the plaintiff here, are fairly inferable from the situation of the parties and the defendants' acts.

[3] It is also urged by defendants, in support of this same assignment, that if any damage was done to plaintiff by reason of the fraudulent acts of the defendants, "that it was a special damage and not a general damage," and by reason of that fact that the complaint did not set forth the elements of the special damage incurred by the plaintiff. Hence, it is argued, no damages can be recovered against the defendants herein. There is merit in this contention. "General damages are such as the law implies and presumes to have accrued from the wrong complained of. They are such as naturally and necessarily result from the wrong, although this does not mean that they must inevitably and always result from a given wrong. . . . The subject of general and special damages as contradistinguished is principally a question of pleading, the general rule being that, where special damages are not claimed, a party can recover only such damages as are not only the natural and proximate result, but also the necessary result of the act complained of." (17 C. J. 712, sec. 20.)

The defendants were obliged to conduct themselves and to carry on their business in such a way as to be not unfairly or unjustly detrimental to plaintiff. Because of their admitted actions in this matter they breached that obligation in this, that because of defendants' adoption in use of the same name as that under which plaintiff had been and was at the time of said breach conducting his business, the Gray-Maw Music Company, a corporation, refused to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music. It is undoubtedly true that such injury might be said to follow *naturally* as a result of the defendants' said actions. We do not think, however, that it can be successfully maintained that they were such damages as *necessarily* would follow or result therefrom.

[4] It follows, we think, that because of the absence of a pleading setting forth the special damage referred to, the court erred in overruling defendants' objection to the reception of evidence in support of the item of one hundred dollars damages found by the court to have been actually suffered by plaintiff as aforesaid. The purpose of the rule requiring that such damages must be specially pleaded is to advise the defendant of the case he is expected to meet, and thus to prevent surprise at the trial. And where the admission of evidence as to special damages not specially pleaded will result in a reversal where it cannot be ascertained whether any such damages were allowed, it is prejudicial error to receive such evidence, in the absence of such a pleading, over defendants' objection. (8 R. C. L., sec. 157; *Treadwell v. Whittier*, 80 Cal. 574, [13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266]; *Terrace W. Co. v. San Antonio etc. Co.*, 1 Cal. App. 511, [82 Pac. 562]; *Morris v. Allen*, 17 Cal. App. 684, [121 Pac. 690].) It follows, therefore, that there is no legal evidence to support the finding as to this item of one hundred dollars.

The judgment, in so far as it awards damages to the plaintiff, is reversed. In all other respects it is affirmed.

Finlayson, P. J., concurred.

SLOANE, J., Concurring.—I concur in the decision, but not in all the conclusions of the majority opinion.

Unless the trial court was justified in finding that the defendants were guilty of fraudulent attempt to pirate the business and patronage of the plaintiff, from the mere fact that they attempted to appropriate to their own use the trade name under which plaintiff was doing business, I fail to see whercin the findings are supported by the evidence.

That there was a deliberate plan and purpose of the defendant Schryock to deprive the plaintiff of the use and benefit of the name "San Diego Conservatory of Music," and, in so far as possible, by incorporating his own business under the same name, obtain the exclusive use of such name, I think there is no doubt. But I fail to find any evidence in the record that he intended or attempted or used any means calculated to deceive the public or patrons of the plaintiff

into patronizing his business under the belief that they were patronizing the plaintiff, other than by the bare use of the same trade name. And there is certainly no evidence, if such was his purpose, that he succeeded in doing this with a single individual. The only publicity given the defendants' business after incorporating under the same name, "San Diego Conservatory of Music," so far as appears in evidence, was certain advertisements in the San Diego papers in which he announces the "San Diego Conservatory of Music (Incorporated)," with the name of "B. Roscoe Schryock, Director," displayed and emphasized in black-faced type. This use and display of defendant Schryock's name is calculated to distinguish his conservatory of music from the one which it is claimed owes its identity and standing to the name and personality of Chesley Mills, the plaintiff in this action. From the obvious attitude of these two rival musicians toward each other, it is probable that the last thing either of them would desire would be to have any of their patrons think he was serving the other's brand of music. If the defendant Schryock had located his home and business in the immediate vicinity of the plaintiff's school of music for the first time in connection with the incorporating under the same name, it might be argued from that circumstance that he chose the location with a view to confusing the public as to the identity of the two schools; but the record discloses that Schryock had been on the ground and teaching music there nearly, if not quite, as long as had plaintiff, and in the neighborhood of two years before he incorporated under the same name that plaintiff was using.

It seems clear from the settled rule in this state that the mere appropriation of a geographical name which has previously been adopted and is in use by a rival in business affords no ground of action unless accompanied by acts of unfair competition calculated to deceive the public into patronizing the usurping concern under a mistake as to identity. The name "San Diego Conservatory of Music" is admittedly not one that is subject to exclusive appropriation as a trade name, and the rule applicable to such trade designations is laid down in the leading case of *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, [50 Am. St. Rep. 57, 30 L. R. A. 182, 42 Pac. 142], in the following words of the syllabus: "Although there can be no proprietary right in a

trade name which is not the subject of a trademark, yet it is a fraud on a person who has established and carried it on under a given name that some other person should use the same name in such a way as to induce persons to deal with him in the belief that they are dealing with one who has given a reputation to the name." As is said in *Banzhaf v. Chase*, 150 Cal. 190, [88 Pac. 704], "the gist of the action is not the appropriation and use of another's trademark, but is based upon the fraudulent injury to and appropriation of another's trade." If in this case the defendants' acts were confined to the mere appropriation of the trade name used by plaintiff, without acts calculated to mislead those desiring to patronize the plaintiff into patronizing the defendant through a mistake in identity, no cause of action is shown.

I am not sufficiently satisfied, however, to justify dissenting from a majority of the court, that the mere fact of the appropriation of the name of plaintiff's business to a rival business, to be carried on in the same immediate vicinity, may not in itself sufficiently establish a condition calculated to mislead plaintiff's patrons, and justify a finding of the trial court to that effect, beyond reversal on appeal for want of evidence. The attempt to deprive plaintiff of the benefit of the trade name under which in good faith he had established his business was morally indefensible, and I do not know that the appellate court should go out of its way to strain a legal point in defendants' favor.

I cannot, however, agree with the conclusions of the opinion that there is evidence of intention on the part of defendants to mislead the public as to the separate identity of the two music concerns, or that they have been guilty of anything more than a constructive fraud.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 28, 1920, and the following opinion then rendered thereon:

THE COURT.—In denying the petition for a hearing in this court after decision by the district court of appeal of the second appellate district, division two, it seems proper to note that by the complaint the alleged damage was confined to loss of patronage in that the use of its name by

defendants has actually misled, and does still mislead, the public to patronize defendants in the belief that they are patronizing the plaintiff, and that the reputation of the plaintiff's business has been greatly injured and damaged. The only evidence in fact introduced on the subject of actual damage related to an entirely different matter. As the pleadings stood the evidence was inadmissible, and the finding of actual damage is without support in the evidence.

The petition for hearing in this court is denied.

All the Justices concurred.

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[Civ. No. 3306. First Appellate District, Division One.—May 1, 1920.]

H. G. WILLITS, Administrator, etc., Respondent, v. EMMA L. HELMER et al., Defendants; BERTHA HELMER, Appellant.

[1] **TRUSTS — ACTION TO ESTABLISH — EVIDENCE — FINDING.**—In this action brought to have it determined that the defendants held certain real property which, it was alleged, had been purchased with funds belonging to the plaintiff and to have a trust thereon declared in his favor, in which the defendants claimed that the property in question was purchased with moneys belonging to them before they came to this state, the testimony of the defendants was so surrounded with the elements of uncertainty, improbability, and suspicion that the trial court was justified in disregarding it and in finding that at the time they came to this state they had no property of any substantial value.

[2] **APPEAL—INSUFFICIENT PRESENTATION OF POINTS.**—The appellate court cannot be expected to search the record for grounds of alleged error, where neither argument nor authority, nor any reference to the evidence whatsoever, is urged by the appellant in support of her contentions.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Griffith Jones and John J. Craig for Appellant.

Kemp, Mitchell & Silberberg for Respondent.

RICHARDS, J.—This action was instituted during the lifetime of one M. L. Willits, now deceased, through his guardian *ad litem* to have it determined that the defendants held certain real property which, it was alleged, had been purchased with funds belonging to the plaintiff, to have a trust thereon declared in his favor, and to also obtain an accounting for certain other moneys and property alleged to have been received by certain of the defendants from said plaintiff under the circumstances set forth at length in the complaint.

Shortly after the institution of the action M. L. Willits died, and the suit was continued in the name of the administrator of his estate.

Upon the trial of the cause the court made its findings and conclusions of law in the plaintiff's favor, and judgment was accordingly rendered establishing such trust and directing such accounting. The defendant Bertha Helmer appeals.

The facts of the case briefly stated are these: The defendant Emma L. Helmer, daughter of the appellant herein, became acquainted with said M. L. Willits during the year 1911 at Clinton, Iowa, and in the month of November of that year the said M. L. Willits came with the Helmer family to San Diego, California, and thereafter was an inmate of the family up to a short while before his death. Willits at the time of his arrival in California was well along in years and had considerable means in the form of money and also in the form of a valuable piece of property in Illinois, a portion of which latter property he sold in the year 1912 for the sum of fourteen thousand dollars, and the remainder of which he conveyed to the defendant Emma L. Helmer by a deed executed in April, 1914, but which was not recorded until after his death. It is alleged in the complaint, and found by the court, that between the date of the arrival of said M. L. Willits in California and the latter part of the year 1914, the said Emma L. Helmer obtained from him sums of money at various times aggregating in all about twenty thousand dollars, and that she also obtained from him the deed to the farm in Illinois, through undue influence and while he was of unsound mind. It is also alleged in the complaint and found by the trial court, that a large part of the money thus obtained from him was invested



by said Emma L. Helmer in those certain pieces of real estate which are sought to be impressed with a trust. The findings of the trial court are quite full and detailed with respect to the history of the relation between M. L. Willits and the Helmer family from the year 1911 to 1914. The appellant does not in the main attack these findings in such a way as to require us to go into a detailed consideration of the question as to whether they are sustained by the evidence in the case. [1] The chief contention of the appellant seems to be that the evidence is insufficient to justify that portion of finding IV wherein the trial court, dealing with the question as to whether the real properties purchased by the defendant Emma L. Helmer were bought with money received from said Willits, or were purchased, as the defendants claimed, with money belonging to Emma L. Helmer and Bertha Helmer before they came to California, stated in said finding "that the said Emma L. Helmer and the said Bertha Helmer had no property of any substantial value." It is true that both of these defendants testified that Emma L. Helmer had approximately the sum of one thousand two hundred dollars in her possession when she came to California, and that her mother, Bertha Helmer, had at the same time the sum of about nine thousand dollars in money, and that these moneys had been invested in some real estate; but an examination of the record shows that this testimony on the part of said defendants was so surrounded with the elements of uncertainty, improbability, and suspicion as to have entirely justified the trial court in disregarding it.

Upon the question of the undue influence exercised by the Helmers over said Willits it is not necessary to set forth in detail the history of that branch of the case, since the supreme court of this state in the *Matter of the Estate of M. L. Willits, Deceased*, 175 Cal. 173, [165 Pac. 537], has fully reviewed the identical evidence which was introduced in that case and also in this one, in dealing with the relations between the parties and the extent of the undue influence which was exercised by Emma L. Helmer over said Willits in procuring a will to be executed by him in her favor; and in concluding such review the court quite aptly says: "It would be a serious reflection upon the intelligence of the profession if space should be given to a discussion of the sufficiency or

insufficiency of this evidence to support the verdict. It speaks so positively and convincingly as to require no comment."

[2] As to the other points made by the appellant herein they require no extended consideration. The appellant urges as errors of law occurring at the trial and excepted to by the defendants the alleged failure of the court "to grant defendant Bertha Helmer's motion to dismiss said action as to said defendant," and also "the court's failure to grant defendants' motion for a nonsuit"; but neither argument nor authority, nor any reference to the evidence whatsoever, is urged in support of either of these contentions, and this court cannot be expected to search the record for grounds of such alleged errors which the appellant has altogether failed to urge.

Judgment affirmed.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

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[Civ. No. 3204. Second Appellate District, Division Two.—May 1, 1920.]

HANNAH EDGE, Respondent, v. E. P. BRYAN et al.,  
Appellants.

- [1] VENDOR AND VENDEE—PRESENCE OF GAS-PIPES UNDER LAND—REPRESENTATION OF EXISTING FACT.—A representation by the vendor to the vendee under a contract for the purchase of certain land "that gas-pipes were already upon or under the land" is of an existing fact, and not a promise of something to be done before the completion of the contract.
- [2] ID.—"VIRGIN SOIL"—EXPRESSION OF FACT.—A representation by the vendor to the vendee that the land agreed to be sold was "virgin" soil was an expression of fact, and not one of opinion, where, on being asked what "virgin soil" meant, the vendor said that it "had been a sheep pasture and never cultivated."
- [3] ID.—REPRESENTATIONS OF VENDOR—RELIANCE ON BY VENDEE—WHEN NOT EXPRESSIONS OF OPINION—ESTOPPEL.—Where the vendee relies on the representations of the vendor, and acts upon the

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3. Right to rely on representations by vendor as to quality or condition of soil, note, L. R. A. 1917C, 273.

faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representations were mere expressions of opinion, when they are discovered to be false.

[4] **ID.—SUFFICIENCY OF PLEADING AND PROOF.**—In this action by the vendee against the vendors to rescind a contract for the purchase of land, and for damages, the plaintiff not only alleged, but proved, that she believed the representations made by the defendants were true and relied upon them and that she was damaged thereby.

[5] **ID.—DEFENSE NOT PLEADED—REJECTION OF EVIDENCE PROPER.**—In such action, the trial court properly sustained plaintiff's objections to certain evidence offered by defendants, which evidence tended to prove that during a certain period of time the land which was not under cultivation was covered with barley stubble, and as to whether defendants had themselves farmed this particular piece of land, where there was no allegation setting up that defense.

**APPEAL** from a judgment of the Superior Court of Orange County. Z. B. West, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. W. Butler for Appellants.

William M. Morse, Jr., and Sam B. Dannis for Respondent.

**THOMAS, J.**—Appeal from a judgment of the superior court by the defendants, E. P. Bryan, L. T. Bradford, and H. H. Cotton, entered against them and in favor of the plaintiff, for the sum of \$2,669.84. The complaint alleged facts which, if true, would support a rescission of the contract referred to therein, and a recovery of damages claimed, if proven. Demurrer to the complaint was interposed, general and special, and by the court overruled. The answer of the defendants denied generally and specifically all the material allegations of the complaint.

The complaint for the relief asked was based upon certain alleged fraudulent representations made at the time of an alleged sale of real property, and which said alleged fraudulent representations, as set forth in the complaint, are as follows: “(1) That gas-pipes were already upon or under said land; (2) that said land was virgin, rich and arable;

(3) that before the completion of the contract of purchase, water would be piped by the defendants to every acre of said land; and (4) that before the completion of said contract, defendants would build in the subdivision, at a point convenient of access to the land purchased by plaintiff, a warehouse for the storing and marketing of the respective products of said land. That said representations, facts and promises were a part of the consideration which induced the plaintiff to enter into said memorandum or agreement of purchase." Then follows the usual allegation that said representations were false, and by the defendants known to be false, specifically specifying the facts supporting this statement. The complaint further alleges: "That said promises of defendants were false and fraudulent, and were made without any intention to perform the same or to carry out any of the terms of said promises, and for the sole purpose of inducing plaintiff herein to enter into said purchase"; that plaintiff believed said statements to be true; and that so believing she entered into said contract, etc.

It is assumed by appellants, for the purpose of their argument on this appeal—and this assumption is supported by the record—that plaintiff's proof sustains her allegations as to both the representations and the promises. They urge passionately, notwithstanding this fact, that "as a general rule it is established that representations, to be actionable, must be of an existing fact or present condition, and not as to future intention," and "must have been made without intention to perform." There is no legal requirement that *all* such statements must be false. They also urge that "it is apparent, therefore, that the time when the alleged promises of defendants were to be performed has not arrived, because the promises were of things to be done before the completion of the contract, and the contract has never been completed"—hence, no cause of action can be maintained under such circumstances.

If this were the question with which we are confronted we could readily concede the correctness of the contention. [1] Among others of the allegations of the complaint we find that it was represented "that gas-pipes were already upon or under the land," and that the land was "virgin, rich and arable." Certainly, the first of these alleged representations is of an *existing* fact. It is also one which, ac-

according to the evidence and the concession of appellants, was at the time it was made untrue. [2] Plaintiff testified that she did not know what was meant by the phrase "virgin soil." We think it immaterial as to what construction the courts have placed upon, or what definition may have been given by any authority of the phrase "virgin soil." There can be no question, we think, when that phrase is construed in the light of the evidence here, but that it was an expression of fact, and not one of opinion; for the evidence shows that the defendants not only said that the land was "virgin," but that, on being asked what "virgin soil" meant, said that it "had been a sheep pasture and never cultivated." To convey the impression that the land was "virgin," under the facts alleged, proven and found by the trial court to be true, was a representation of a fact, and not an expression of an opinion. [3] Moreover, where, as in this case, "the vendee relies on the representations of the vendor, and acts upon the faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representation was a mere expression of opinion, when it is discovered to be false." (12 R. C. L. 248.) Indeed, we think the general modern tendency is to hold the vendor to a fairly strict accountability for his representations made in connection with such sales as that under consideration here. We have no difficulty in arriving at a conclusion on the first point urged by appellants.

[4] The second point presented is that, "assuming that the representations were not true, plaintiff must show that she believed them to be true and relied upon them"; while in the third place it is contended that "she must show that she was damaged by them." We are in full accord with appellants on both propositions, so far as this case is concerned. By a mere cursory perusal of the complaint, and the evidence as disclosed by the record before us, it becomes manifest that plaintiff not only has alleged, but has brought herself squarely to the place where she is not vulnerable to the objections raised.

[5] It is next contended that the court erred in sustaining objections to certain evidence offered by defendants, which evidence tended to prove that during a certain period of time the land which was not under cultivation was cov-

ered with barley stubble, and as to whether defendants had themselves farmed this particular piece of land. As we have already seen, the answers of the defendants were general denials of the material allegations of the complaint. There was no such issue presented. The issue here was as to whether the alleged false representations had in fact been made. The objections were properly sustained. In the absence of an allegation setting up that defense, the evidence was properly excluded. In any event, to have overruled the objections, permitting the presentation of the proffered evidence, would not have changed the result on this case. On the contrary, it would have supported the plaintiff in her claim, for the reason that the evidence sought to be introduced would have been in direct conflict with defendants' statement that the land in question had never been cultivated. In such case defendants cannot complain.

We concur with the learned trial judge in his observation when he said: "In the mind of the court there is not a single meritorious contention on the part of the defendants. No court, in the discharge of its own duty, could permit transactions of the character involved herein to stand."

Judgment affirmed.

Finlayson, P. J., and Sloane, J., concurred.

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[Civ. No. 3338. First Appellate District, Division One.—May 2, 1920.]

**SALVADOR ESPINOSA, Appellant, v. GEORGE S. GOULD, Jr., et al., Respondents.**

- [1] **PLACE OF TRIAL — APPEAL — AUTHENTICATION OF AFFIDAVITS.**—Affidavits used on a motion for a change of place of trial must be identified and authenticated by the trial judge before they can be considered by the appellate court on an appeal from an order denying such motion.
- [2] **ID.—PREPARATION OF SUPPLEMENTAL TRANSCRIPT—POWER OF APPELLATE COURT TO DIRECT.**—Where an appeal is taken by the alternative method under section 953a of the Code of Civil Procedure, the appellate court cannot direct the preparation of a supplemental transcript containing matters not brought before it by

reason of the failure of the appellant to give the proper notice to the clerk of the trial court.

- [8] **ID.—INCOMPLETE RECORD ON APPEAL—PRESUMPTION.**—Where the record on appeal from an order refusing to change the place of trial shows that documentary evidence was used and testimony given on the hearing of the motion, but such evidence and testimony does not appear in the record on appeal, the appellate court has the right to and will assume, in the absence of any showing to the contrary, that the ruling of the trial court was proper.

**APPEAL** from an order of the Superior Court of Monterey County refusing to change the place of trial. J. A. Bardin, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Z. B. Stuart and C. W. Byrer for Appellant.

C. F. Lacey and R. C. McComish, for Respondents.

**WASTE, P. J.**—This is an appeal by the plaintiff from an order refusing to change the place of trial. Plaintiff, theretofore adjudged to be an incompetent person, brought this action against his guardian and the other defendants, seeking to have the proceedings, whereby he was declared an incompetent, set aside as null and void, and praying for damages in the sum of twenty thousand dollars against defendants Manuel Espinosa and R. C. McComish.

The defendants demurred to the complaint, whereupon the plaintiff filed a motion for a change of place of trial, alleging in his affidavit accompanying the motion a belief that he could not have an impartial trial in the county wherein the action was brought by reason of the alleged bias and prejudice of the people of the community against him, and an alleged personal dislike on the part of the trial judge. The latter filed a counter-affidavit, in which he denied any prejudice or bias against the plaintiff, and alleged that he never had entertained and did not feel a personal dislike against him. The motion came on for hearing and was denied, the order of the court reciting, after the introductory portion, "Documentary evidence is introduced, said motion is submitted to the court for consideration and decision without argument, counsel for respective parties stipulating that the testimony in case No. 6598 be considered as given herein, and the court denies said motion."

The appeal is taken by the alternative method under section 953a of the Code of Civil Procedure. The only record brought here is the clerk's transcript, prepared on notice of the appellant. That notice specified, and the transcript contains only the pleadings, notices, affidavit, and notice of motion by the plaintiff, notice of hearing, order of continuance, counter-affidavit of the trial judge, and the order denying the motion for change of place of trial. It is certified to by the clerk of the court but not by the trial judge.

[1] It has long been settled, with regard to the affidavits used on a motion, that they must be identified and authenticated by the trial judge before they can be considered by the appellate court. The certificate of the clerk cannot take the place of the authentication by the judge. There is no other way in which the appellant can present to us the affidavits on the motion in question. (*Waymire v. California Trona Co.*, 176 Cal. 395, 398, [168 Pac. 563].) There is neither a bill of exceptions nor a transcript of the testimony offered or taken, or of the proceedings as authorized by said section 953a.

[2] The appellant has made application here, through a suggestion of diminution of the record, for an order of this court directing the preparation of a supplemental transcript containing the matters not brought here by reason of his failure to give the proper notice to the clerk below. Such relief, if it can be given at all, should have been sought in the lower court (*Estate of Keating*, 158 Cal. 109, 113, [110 Pac. 109]), and the motion is denied.

[3] What documentary evidence was introduced and used on the motion, or what the testimony was in case No. 6598, does not appear. Consequently we have a right to and will assume, in the absence of any showing to the contrary, that the ruling of the court was proper. (*Patterson v. Rutherford*, 39 Cal. App. 647, [179 Pac. 704].)

The order is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 1, 1920.

All the Justices concurred.



[Civ. No. 3007. Second Appellate District, Division One.—May 3, 1920.]

MARY ERICKSON, Appellant, v. O. S. ERICKSON,  
Respondent.

[1] ATTACHMENT—ACTION ON FOREIGN JUDGMENT.—Section 537 of the Code of Civil Procedure does not authorize an attachment to be issued in an action brought in this state upon the liability created by a judgment entered in favor of the plaintiff and against the defendant in another state.

APPEAL from an order of the Superior Court of Los Angeles County dissolving an attachment. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

Emmet H. Wilson for Appellant.

C. W. Benshoof for Respondent.

JAMES, J.—Appeal from an order dissolving an attachment issued at the instance of the plaintiff.

[1] The action was brought in the superior court of the county of Los Angeles and the cause of action stated was upon liability created by a judgment, which judgment was entered against defendant in the state of Washington. Plaintiff, as a prerequisite to the issuance of the attachment, made her affidavit in which she alleged that her claim was "for money due, owing, and unpaid on account of judgment rendered in favor of the plaintiff and against the defendant, and that such contract was made and is payable in this state, . . . " Section 537 of the Code of Civil Procedure permits attachment to be issued in an action upon a contract, express or implied, for the direct payment of money, "where the contract is made or is payable in this state." As to whether a judgment in any clear sense constitutes a contract, is open to debate. English writers on the common law decline to give it that general character because, for one thing, a judgment in contested cases lacks the essential of consent of the party to be bound. However, judgments were sometimes

classified as "contracts of record" upon the assumption that a promise would be implied in law on the part of the judgment debtor to pay the amount adjudged to be due from him. A diversity of opinion is to be found in the decisions on the question. However, the supreme court of this state has affirmed the position that a suit upon a judgment is an action upon contract. (*Bean v. Loryea*, 81 Cal. 151, [22 Pac. 513], and cases cited therein.) Moreover, appellant here necessarily confirms that view, and respondent concedes that the law is so established. A contract is presumed to be payable where made, in the absence of terms providing otherwise. (*Tuller v. Arnold*, 93 Cal. 168, [28 Pac. 863].)

The bald question then for determination is as to whether a contract made in another state and which contains no terms providing that payment shall be made in this state is such a contract as authorizes an attachment to issue in an action brought here. The answer must be in the negative. It has been directly so held: *Dulton v. Shelton*, 3 Cal. 206; *Eck v. Hoffman*, 55 Cal. 502; *Tuller v. Arnold*, *supra*. The cause of action, therefore, as shown, was not based upon a contract made or payable in California, and hence no attachment was authorized to be issued therein. The Oregon case cited by appellant (*Meyer v. Brooks et ux.*, 29 Or. 203, [54 Am. St. Rep. 790, 44 Pac. 281]), was evidently decided under a statute different in terms from those of our section 537 of the Code of Civil Procedure.

The order appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2199. Third Appellate District.—May 3, 1920.]

C. H. BUSCHMANN et al., Appellants, v. TURLOCK IRRIGATION DISTRICT (a Public Corporation), et al., Respondents.

- [1] **WRIGHT IRRIGATION ACT—NEW CONSTRUCTION WORK—ADOPTION OF PLANS AND APPROVAL BY LAND OWNERS.**—The whole purpose and scope of the Wright Irrigation Act, so far as it relates to new construction work, rests upon the adoption of plans and the approval of the land owners of the district, and it does not rest primarily with the directors, who are not, specifically or otherwise, empowered to carry on any new work without such previous authorization.
- [2] **ID.—MANDAMUS TO COMPEL CONSTRUCTION OF SERVICE DITCHES—INSUFFICIENT COMPLAINT.**—In an action seeking a writ of mandate directing an irrigation district organized under the Wright Irrigation Act and the directors of such irrigation district to build a new branch or service ditch from its main canal to the lands of plaintiffs, the complaint fails to state a cause of action where there is nothing therein from which it can be inferred that the land owners of the district have adopted any plans calling for the construction of other than main and lateral canals, or of any canal or ditch which the plaintiffs seek to have constructed by order of the court, and it does not appear therefrom what the proposed work would cost, nor whether, if authorized by the district, the two per cent assessment provided for in section 39 of the act, if otherwise applicable, would prove adequate to defray the expenses of the undertaking.
- [3] **ID.—RATABLE DISTRIBUTION OF WATER—CONSTRUCTION OF SECTION 18 OF ACT.**—Section 18 of the Wright Irrigation Act, which provides "that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district," neither authorizes nor commands the construction of either main, branch, or lateral canals or service ditches which have not been otherwise provided for, but merely directs how the water available for irrigation purposes shall be apportioned when the land owners have their lands prepared for irrigation.

APPEAL from a judgment of the Superior Court of Stanislaus County. G. W. Nicol, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. C. LeHane for Appellants.

Griffin, Boone & Boone and P. H. Griffin for Respondents.

PLUMMER, P. J., *pro tem.*—By this action plaintiffs sought a writ of mandate from the superior court of Stanislaus County, directing the defendants to construct certain ditches and deliver water for irrigation purposes to lands and premises described in the complaint, belonging to the plaintiffs, and situate within the Turlock Irrigation District. The matter is in this court upon appeal from the order and judgment of the trial court sustaining defendants' demurrer to the plaintiffs' complaint.

It appears from the pleadings that the defendant Turlock Irrigation District is a *quasi*-public corporation, organized under the provisions of what is popularly known as the Wright Irrigation Act; that for some time past water has been delivered to the lands belonging to the plaintiffs through a private ditch, called the Delmas ditch, the intake of which is at a point on what is called the Ceres main ditch, constructed by and belonging to the defendant Turlock Irrigation District; that the water thus furnished through the Delmas ditch is lost, in large measure, by means of seepage, and the natural porous condition of the soil traversed by said Delmas ditch before being distributed over the lands of the appellants. To remedy this defect and avoid the loss of water a writ of mandate was prayed for, directing the Turlock Irrigation District and the other defendants herein to take such action as might be necessary to furnish plaintiffs with sufficient water for the irrigation of their lands; that said water be delivered directly to, or close by, the lands belonging to the plaintiffs.

Though not stated in precise form, the relief sought is, in fact, as follows: That the Turlock Irrigation District be required to build a new branch or service ditch from its main canal; that the directors of the district be required to construct said ditch and provide the money for paying the expenses of such construction without any adoption of plans or previous approval by the votes of the land owners of the district. Appellants argue that authority for such an order from the court is found in the last clause of section 39 of the Wright Act, [Stats. 1887, p. 29], relating to the

power of the board of directors of irrigation districts, which clause reads as follows: "Also sufficient to raise such amount, not exceeding two per centum of the aggregate value of the lands within the district according to the latest equalized assessment-roll thereof, as the board of directors shall determine may be needed to be raised by assessment for any of the *purposes* of this Act."

A correct interpretation of this clause requires an examination or analysis of the various provisions which set forth the power and purposes of the act, and how the machinery thereof is to operate.

Section 15 gives the board of directors power to construct canals, waterways, reservoirs, etc., and to acquire land necessary for such purposes.

Section 30 sets forth that "for the purposes of constructing or purchasing the necessary irrigation canals and works and acquiring the necessary property and rights therefor," etc., as soon as the district is organized, and also whenever thereafter a construction fund is necessary, etc., for the purpose of ascertaining the amount of money necessary to be raised, said board shall cause such surveys, examinations, drawings, and plans to be made as shall furnish the proper basis for the amount of money to be raised, which plans, it is provided in section 30a, must be submitted to the commission authorized to approve bonds of irrigation districts. And finally, after the plans, surveys and engineer's report have been approved, the proposition of raising money by a bond issue to carry on construction work according to the plans, surveys, etc., adopted, must be submitted to the voters of the district, as provided by section 30c of said act. In the event that the money raised by bond issues proves insufficient to complete the work undertaken by the district according to its adopted plans, section 34 provides that a special assessment may be levied after the question of so doing has been submitted to, and received a majority vote of, the qualified voters of the district.

Section 67 provides for the creation of certain funds, to wit, a bond fund, a construction fund and a general fund.

Section 55 specifies that the cost and expense of purchasing and acquiring the property and constructing the works and improvements provided for shall be paid wholly out of

the construction fund. (This section includes other items not pertinent to this case.)

Section 61 specifies "that the board of directors and other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the provisions of this act," etc.

[1] It thus appears that the whole purpose and scope of the act, so far as it relates to new construction work, rests upon the adoption of plans and the approval of the land owners of the district; that it does not rest primarily with the directors, and that the directors are not, specifically or otherwise, empowered to carry on any new work without such previous authorization. Hence, if that portion of section 39 relied upon by appellants should be construed to authorize the use by the board of directors of funds so raised in any new work, such funds could only be employed in that manner if such new work had been previously authorized by the voters of the district.

[2] There is nothing in the appellants' complaint from which it can be inferred that the land owners of Turlock Irrigation District have adopted any plans calling for the construction of other than main and lateral canals, or of any canal or ditch which the plaintiffs seek to have constructed by order of this court. It does not appear that anything more than a general system has been provided for. It does appear, by way of argument in the briefs and the general history of irrigation districts, that different plans have been adopted by the voters of different districts. In some, main canals and laterals only have been provided for in the plans, and in others a much more comprehensive system of ditches, calling for the construction at the expense of the district not only of main and lateral canals, but of ditches conveying water to every forty acres of land susceptible of irrigation, has met the approval of the voters of the district.

The complaint is also lacking in other particulars. It does not appear therefrom what the proposed work would cost, nor whether, if authorized by the district, the two per cent assessment provided for in section 39, if otherwise applicable, would prove adequate to defray the expenses of the undertaking.

There is no means by which this court can determine whether any sum raised by the two per cent assessment might properly be applied to the construction of service ditches, and so order its application, without it being specifically shown that such sum is available. The board of directors of the district are given discretion to raise by a two per cent assessment such sum as the board shall determine may be necessary to be raised for any of the purposes of the act. The different purposes are placed upon an equal footing, and it must appear that the different purposes will not exhaust the fund for which it has been raised before the application of such fund may properly be ordered by this court applied to any particular project.

[3] Considerable stress is laid upon section 18, wherein it is "expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district." We do not, however, agree with the contention that this section either authorizes or commands the construction of either main, branch, or lateral canals or service ditches which have not been otherwise provided for. Its plain import would seem to be that when the land owners have their lands prepared for irrigation, have their service ditches connected with the system built by the district, then and in that case distribution of the water available for irrigation purposes is to be apportioned ratably, as therein set forth.

Being of the opinion that plaintiffs' complaint does not set forth a cause of action, it follows that the order and judgment of the trial court should be, and the same are, hereby affirmed.

Burnett, J., and Hart, J., concurred.

[Crim. No. 501. Third Appellate District.—May 3, 1920.]

THE PEOPLE, Respondent, v. WON LEE WING,  
Appellant.

[1] CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—APPEAL—AFFIRMANCE OF JUDGMENT.—Where a defendant charged with the crime of assault with a deadly weapon with intent to commit murder is found guilty of assault with a deadly weapon and, on appeal, no argument is made in his behalf and no reason appears why the verdict should be disturbed, the judgment will be affirmed.

APPEAL from a judgment of the Superior Court of Sacramento County. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Geo. E. Foote and J. W. Mento for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

THE COURT.—Defendant was charged with the crime of assault with a deadly weapon with intent to commit murder and he was convicted of assault with a deadly weapon.

[1] No argument has been made in this court in his behalf, his counsel concluding, no doubt, in view of the record, that any discussion would be useless. The evidence is overwhelming and conclusive as to his guilt. Indeed, he was greatly favored by the jury in rendering a verdict for the lesser offense. His rights were all safeguarded by the lower court and he had a fair trial. No reason exists why the verdict should be disturbed, and the judgment is, therefore, affirmed.



[Crim. No. 503. Third Appellate District.—May 3, 1920.]

THE PEOPLE, Respondent, v. T. WAH HING, Appellant.

- [1] **MEDICAL PRACTICE ACT—SUFFICIENCY OF TITLE.**—The title of the State Medical Practice Act, approved June 2, 1913, (Stats. 1913, p. 722), is sufficiently comprehensive to include the matters contained in section 17 thereof.
- [2] **ID.—VIOLATION OF SECTION 17—SUFFICIENCY OF INFORMATION.**—An information which alleges that the defendant at a given time and place "did then and there willfully and unlawfully practice, attempt to practice and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in the State of California, without having at the time of so doing a valid unrevoked certificate from the State Board of Medical Examiners of the State of California," sufficiently charges a violation of section 17 of the State Medical Practice Act.
- [3] **ID.—CONVICTION OF VIOLATION OF ACT—SUFFICIENCY OF EVIDENCE.** In this prosecution for a violation of section 17 of the State Medical Practice Act, in which the defendant was tried and convicted, the evidence was sufficient to justify the verdict.
- [4] **ID.—POSSESSION OF CERTIFICATE—BURDEN OF PROOF.**—In a prosecution for a violation of section 17 of the State Medical Practice Act, the burden is on the defendant to prove that at the time charged in the information he had a valid, unrevoked certificate from the state board of medical examiners; and where such proof is not offered, it must be taken as true that he had not procured a certificate to practice medicine.
- [5] **ID.—REASONABLE DOUBT — PROPER INSTRUCTION.**—An instruction that the term "reasonable doubt" as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case, and does not mean a doubt which may arise from some whim or vagary or from any groundless surmise or guess, is not erroneous.
- [6] **MUNICIPAL CORPORATIONS — SACRAMENTO — POLICE COURTS—JURISDICTION AS TO MISDEMEANORS.**—The jurisdiction of the police court of the city of Sacramento, as to misdemeanors committed under the general laws of the state, is concurrent with that of the justices' courts of the county of Sacramento.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

T. H. Christiansen, Robert B. McMillan, S. Luke Howe, C. E. McLaughlin and C. P. McLaughlin for Appellant.

U. S. Webb, Attorney-General, J. Chas. Jones, Deputy Attorney-General, Harry A. Encell and Frank M. Smith for Respondent.

NICOL, P. J., *pro tem.*—Defendant was charged by an information filed in the superior court of Sacramento County with a violation of section 17 of the State Medical Practice Act, approved June 2, 1913 (Stats. 1913, p. 722). The information alleges that: "The said T. Wah Hing on the — day of August 1919, at the County of Sacramento in the said State of California and before the filing of this information did then and there willfully and unlawfully practice, attempt to practice and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in the State of California, without having at the time of so doing a valid unrevoked certificate from the State Board of Medical Examiners of the State of California."

The defendant was tried and convicted and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

[1] The defendant attacks the constitutionality of the law on the ground that the title of the act is not sufficiently comprehensive to include the matters contained in said section 17. A similar objection was raised to the title of this act in *People v. Jordan*, 172 Cal. 391, [156 Pac. 451], and was decided adversely to appellant's contention. In that case it was contended that the title of the Medical Practice Act violated the provisions of section 24 of article IV of the constitution in that the title was not sufficiently expressive of its contents. The court, in passing upon this contention, said: "It is first contended that the title of the act is not sufficiently expressive of its contents, and that section 24 of article IV of the constitution is violated thereby. Analyzed further, the contention is that the title of the act does not suggest a purpose of the legislature to regulate the business or practice of those who engage in healing or treating the sick or deformed, but to regulate only the matter of the examination of those who chose to apply for certificates, which documents are to merely certify that the holders

thereof have been duly examined and licensed. This contention, if it were conceded to be well founded, would result in a construction to be given to the act which would permit all persons whomsoever to practice medicine, or any mode or system of healing, without being licensed, and would make the matter of procuring a license or certificate merely optional. Admittedly the body of the act is broad and comprehensive enough to regulate the practice of all persons who shall engage in the business of treating the sick or deformed. . . . A liberal rule of construction has been adopted, however, in the interest of protecting meritorious legislation from being declared void through artificially constructed titles. 'The main object of this provision is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. . . . It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents.' (*Abeel v. Clark*, 84 Cal. 226, [24 Pac. 383].) . . . To our minds, by the title of the act here being considered, wherein it set forth the purpose to regulate the examination of applicants for license to treat the sick or deformed, there is suggested at once that the state has proposed to require examinations to be made and licenses to be issued to persons who shall engage in that business. The prohibition that persons not so licensed shall be denied the right to practice seems pertinent and germane to the subject expressed in the title. Several of the illustrative cases given in *Ex parte Liddell*, 93 Cal. 633, [29 Pac. 261], are directly in point.

"Our conclusion on this branch of the case is that the objection as stated in the briefs that the title of the act is not sufficient in its expression of the purposes declared in the body of the act itself, is without merit."

[2] The defendant claims that the information is insufficient in that it "does not conform to the sections of the Penal Code [secs. 950, 952] requiring clearness and certainty in charging crime." That it does not give the name of any patient, or disease treated, the mode or system of treatment practiced, but "charges that defendant practiced, attempted to practice and held himself out as practicing a mode or system of healing the sick and afflicted."

The information in this case is substantially the same as the information that was before the supreme court in *People v. Ratledge*, 172 Cal. 401, [156 Pac. 455], and which the court held sufficiently charged a violation of section 17 of the said Medical Practice Act. The court said: "The information is attacked upon the ground that it charges 'the crime of practicing medicine without a certificate from the medical board,' the contention being that no such crime is denounced by the law. It is true that the statute does not contain the quoted words but clearly they are used merely for purposes of general description of the offense as they are followed by the averment that the crime was 'committed as follows: that the said T. F. Ratledge on the thirtieth day of October, 1914, at, and in the county of Los Angeles, state of California, did willfully, and unlawfully practice, attempt to practice and advertise and hold himself out as practicing a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid, unrevoked certificate authorizing him to practice a system or mode of treating the sick and afflicted in this state from the board of medical examiners of the state of California.' This sufficiently charges a violation of section 17 of the Medical Practice Act (Stats. 1913, p. 734), and is not open to the criticism that it seeks to impute many offenses to defendant because any one of the acts or omissions averred and conjunctively pleaded would suffice as the basis of an information. (Citing cases.) This information does not fall within the rule declared in *People v. Plath*, 166 Cal. 227, [135 Pac. 954]."

[3] It is argued on behalf of appellant that the evidence is insufficient to justify the verdict. It appears from the record that on the thirteenth day of August, 1919, one Mrs. Francis Sweeney, who was then employed by the state board of medical examiners, called at the office of the defendant in Sacramento and asked him if he was Doctor T. Wah Hing, to which defendant replied that he was. She told him that she was afflicted with nervousness and not able to sleep. He felt her pulse, said he would give her some medicine to cure her, and gave her a package of herbs, giving directions as to their use and charged her \$3.50, which she paid. She then left his office and returned shortly after with one Edward P. Morse, then a special agent of the state

board of medical examiners. The defendant stated to said Morse that he had treated Mrs. Sweeney for nervousness and prescribed medicine for her and had charged her \$3.50. He told Morse that he was a regular practicing physician, and had been for twenty years in Sacramento. That he treated any kind of a case; that he gave internal and external remedies. He took Morse to his drug-store in the rear of this office, where there was a large assortment of herbs and drugs. He also exhibited to Morse a record of his patients showing various names and dates, and amounts against those names. There was also introduced in evidence a card, which reads: "Telephone Main 725. Dr. T. Wah Hing, Chinese Physician and Surgeon, also Eye, Ear, Nose and Throat. Office 725 J Street, Sacramento, Cal. Office Hours 9 to 11 a. m., 1 to 3, 7 to 9 p. m." This card was handed to Mr. Morse by the defendant.

This evidence is ample and sufficient to sustain the conviction of the defendant, and in addition to the foregoing there was other and additional evidence which tends strongly to support the verdict.

[4] The defendant claims that the judgment should be reversed for the reason that no proof was offered showing that the defendant did not, at the time charged in the information, have a valid, unrevoked certificate from the state board of medical examiners. A similar question was before the supreme court in *People v. Boo Doo Hong*, 122 Cal. 606, [55 Pac. 402]. In that case the defendant was charged by information with the crime of willfully and unlawfully practicing medicine without having first procured a certificate to so practice as required by law. At the trial uncontradicted evidence was introduced showing that defendant had been practicing medicine, but no evidence was introduced on either side showing, or tending to show, that defendant had not a certificate to so practice as required by law. The court instructed the jury, in effect, that the burden was upon the defendant to establish that he had a certificate to practice medicine as provided by law, and, if he failed to prove that he had such certificate, then it must be taken as true that he had not procured a certificate to so practice medicine.

The court, in sustaining this instruction, among other things, said: "Mr. Greenleaf, in his work on Evidence,

volume 1, section 79, under the heading 'Negative Allegations,' says: 'But when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.'

"In 1 Jones' Law of Evidence, section 179, under the heading 'Burden as to particular facts lying peculiarly within knowledge of a party,' it is said: 'This is often illustrated in prosecutions for selling liquors or doing other acts without the license required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and, if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that where a license would be a complete defense the burden is upon the defendant to prove the fact so clearly within his own knowledge.'

"We think the rule upon this subject generally recognized and followed the correct one, and therefore conclude that the court did not err in giving the instruction complained of, and that the verdict was justified by the evidence."

[5] Complaint is made that the court erred in its instructions upon the doctrine of reasonable doubt. After fully instructing the jury on this subject in the oft-approved language of Chief Justice Shaw, the court gave the following instruction, which the defendant claims is error: "The term reasonable doubt as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess." A similar instruction to this was held by this court not to be erroneous in the case of *People v. Del Cerro*, 9 Cal. App.

764, [100 Pac. 887], and the court there said "that, rightly understood, the instruction is in reality within the definition of the doctrine of reasonable doubt as given by Chief Justice Shaw."

Other objections are based upon the modification and the refusal of certain instructions. We have examined these objections and without entering upon a discussion of them in detail, we think it is sufficient to say that they are without merit. The jury was very fully and fairly instructed by the court.

[6] Finally, the appellant claims that under the charter of the city of Sacramento, ratified by the legislature in 1911 (Stats. 1911, Extra Sess., p. 305), the police court of said city has jurisdiction over all misdemeanors, no matter what may be the amount of the fine or the length of imprisonment. This contention of appellant is based on the first subdivision of section 164 of the said charter, which provides as follows: "Said police court shall have jurisdiction: (1) Of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the constitution and laws of the state of California."

We cannot agree with appellant in this contention. It is nowhere provided in said charter that the police court of the city of Sacramento shall have jurisdiction of misdemeanors where the maximum penalty is by fine exceeding five hundred dollars, or imprisonment exceeding six months.

This court held in the *Matter of the Application of Yee Kim Mah*, 31 Cal. App. 196, [159 Pac. 1060], that the provisions of said charter creating a police court in the city of Sacramento did not "confer upon the court so established exclusive jurisdiction of all simple misdemeanors committed within the limits of said city. The word 'exclusive' is nowhere used in those provisions. It is obvious to our minds that the most that was intended by those provisions of the charter, so far as are concerned misdemeanors committed under the general laws of the state, is that the police court of said city shall have concurrent jurisdiction with the justices' courts of the county of such misdemeanors when they are committed within the limits of said city."

It is obvious from the foregoing that the jurisdiction of the said police court as to misdemeanors committed under the general laws of the state is the same as the justices' courts of Sacramento County. There is no provision of said charter that supercedes or that is in conflict with or repugnant to any of the provisions of section 1425 of the Penal Code.

The judgment and order appealed from are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 1, 1920.

All the Justices concurred.

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[Civ. No. 3196. First Appellate District, Division One.—May 3, 1920.]

CHARLES F. STERN, Superintendent of Banks, Respondent, v. SUNSET ROAD OIL COMPANY, Defendant; SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, Appellant.

- [1] **CONTRACTS — DIVISIBILITY — INTENTION OF PARTIES — OBJECT OF AGREEMENT—DEFAULT IN PART.**—The divisibility of a contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract. If it is the intention of the parties to treat the contract as an entire contract, and it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed, it is not a divisible contract, and the contracting parties will not be allowed, under those circumstances, to perform part of the contract and default in its other parts without being held answerable for the performance of the entire contract.
- [2] **ID.—AGREEMENT TO SUPPLY OIL FOR CURRENT USE AND STORAGE—DIVISIBILITY OF—INTENTION OF PARTIES.**—In this action involving the construction of a contract under which an oil company agreed

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1. Contract for sale of goods as entire or divisible, note, 2 A. L. R. 643.



to supply a railroad company with fuel oil for current use and for storage, considering the situation of the parties and the object of the original contract and of the supplemental agreement under which the railroad company made certain advances on account of the fuel oil supplied for storage that the oil company might develop its properties that oil both for current use and storage oil might be produced, it was plain that the intention of the parties was to treat the contract as a whole, and that they would not have entered into one part of the contract on the terms therein specified had it not contained the other part.

- [3] **ID.—ADVANCES ON ACCOUNT OF OIL TO BE SUPPLIED FOR FUTURE USE—DEFAULT BY OIL COMPANY—RIGHT OF RECOUPMENT AS AGAINST ASSIGNEE.**—The railroad company, pursuant to such supplemental agreement, having made the advances to the oil company on account of the fuel oil to be supplied for storage, but the latter having defaulted in the performance of that part of its contract, the railroad company had the right to recoup itself, as against the claim of the assignee of the oil company for oil supplied for current use, to the extent of such advances, notwithstanding the default was not made until subsequent to the receipt by the railroad company of notice of the assignment.
- [4] **ID.—NOTICE TO ASSIGNEE OF SUPPLEMENTAL AGREEMENT AND ADVANCES THEREUNDER—ESTOPPEL OF RAILROAD COMPANY TO CLAIM RIGHT TO RECOUPMENT.**—The railroad company was not estopped to claim the right to recoup itself because of the fact that, upon receiving notice of the assignment of the claim of the oil company, it did not notify the assignee that it had a claim, or intended to make a claim, against the oil company because of the advances made by it under the supplemental agreement on account of the oil to be supplied for storage, where the circumstances were such that it had a right to assume that such assignee was fully informed of the supplemental agreement under which such money was advanced and it had no knowledge or notice that such assignee had advanced or intended to advance to the oil company any money on the shipments of oil for current use.
- [5] **ESTOPPEL—KNOWLEDGE OF FACTS—BURDEN OF PROOF.**—Before such assignee could successfully urge such estoppel, the burden was on it to show that it was not only destitute of knowledge of the real facts, but that it was without convenient or ready means of acquiring such knowledge.
- [6] **ID.—DUTY TO INFORM OF REAL FACTS.**—No estoppel arises where a party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself.
- [7] **ID.—ESSENTIALS OF—EFFECT OF SILENCE.**—In order to constitute an estoppel it must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party

sought to be estopped. There must be an intentional deceit or gross negligence shown, and if silence is relied upon to constitute the estoppel, such silence must be willful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict; but where there is no duty to speak, mere silence will not create an equitable estoppel.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge. Reversed.

The facts are stated in the opinion of the court.

Fred E. Pettit, Jr., Dana T. Smith, E. E. Bennett and A. S. Halsted for Appellant.

A. A. De Ligne, Geo. E. Whitaker, T. N. Harvey and Raymond Benjamin for Respondent.

KNIGHT, J., *pro tem.*—This action was originally commenced by the Kern Valley Bank. Prior to trial W. R. Williams, superintendent of banks, was substituted as plaintiff, he then having charge of the affairs of said Kern Valley Bank for the purposes of liquidation. Later Williams was succeeded as superintendent of banks by Charles F. Stern, and the latter was thereupon substituted as plaintiff and respondent. The action concerns the sale and delivery of oil. Judgment was rendered in favor of plaintiff and against defendant San Pedro, Los Angeles and Salt Lake Railroad Company for the sum of \$8,926.35, plus \$5,908.25 interest from which judgment said defendant Railroad Company appeals.

The facts are substantially without conflict, and are as follows: On July 1, 1907, defendant Sunset Road Oil Company, a corporation, and its subsidiary corporation, Operators Oil Company, contracted in writing with the defendant San Pedro, Los Angeles and Salt Lake Railroad Company to sell and deliver to the latter all oil required for the use of said railroad company for a period of five years, two hundred thousand barrels of which was to be stored prior to January 1, 1908, and the remainder to be delivered to and used by said Railroad Company for current use. Payments were to be made not later than the 15th of each calendar month for all deliveries made during the preceding

calendar month. Said contract also contained provisions relating to the character of oil, the temperature deductions, etc. Later said contract was supplemented by two other agreements, the first of which is not material here. The second was executed February 4, 1908, and by proper recitals was made a part of the original contract. The two important features of the second supplemental agreement were, first, the postponement of the date for the commencement of the delivery of the storage oil until April 1, 1908, deliveries to be made thereafter daily at the rate of not less than three or more than ten carloads per day until the full amount of said storage oil was delivered; secondly, the acknowledgment by said oil companies of the payment to them by said Railroad Company of the sum of sixty thousand dollars on account of future deliveries of storage oil. It was also provided in said second supplemental agreement that all payments for current use oil delivered after April 1, 1908, should be paid for in accordance with the provisions of the original agreement, that is, not later than the 15th of each calendar month.

On April 8, 1908, said oil companies assigned the payments due them under said contract to the Kern Valley Bank, in consideration for which said bank agreed to and afterward did advance to said oil companies the sum of twenty-five cents a barrel on all oil shipped to said Railroad Company. At the time of said assignment said bank had no knowledge of the existence of said second supplemental agreement, nor of the payment to said oil companies by said Railroad Company of said sum of sixty thousand dollars, its knowledge of the transaction between said oil companies and said Railroad Company being confined to the contents of the original agreement. Notice of said assignment was given to said Railroad Company by means of a letter, written on April 8, 1908, by the representative of said oil companies to said Railroad Company, in the form following: "Please pay to the Kern Valley Bank of Bakersfield, California, at due dates, the proceeds of all oil heretofore shipped to you by us and that may be hereafter so shipped, terms our contract with you. This order to remain in full force and effect until revoked by us with the consent of said Kern Valley Bank. Please make formal acknowledgment of the within order to the Kern Valley Bank and oblige."

Said Railroad Company replied by letter to said notice, and after acknowledging receipt of said letter of April 8th, stated: "I am returning this order herewith under advice of our Legal Department, for necessary correction. We cannot accept any orders for 'future payments'; in other words, a separate order should be given covering each month's voucher, and sufficient identification carried in the order with reference to your invoices as to distinctly identify the payments. . . . If you will kindly arrange to take action as suggested above I will in the meantime issue instructions that vouchers be rendered to your company for payment through the Kern Valley Bank. In the meantime please let me have corrected order covering payment for month of April, and let future orders come in as suggested."

Said Railroad Company received no notice whatever from said bank concerning said assignment, nor did it have knowledge at any time of the existence of the agreement made by the bank with said oil companies, or of the advancements made or to be made by said bank of twenty-five cents a barrel on all oil shipped to said Railroad Company.

On April 15 and 16, 1908, said Railroad Company paid to said bank, on invoices for oil, duly assigned to said bank by having stamped twice thereon the words "Payable to the Kern Valley Bank, Bakersfield," the sums of \$1,634.78 and \$2,685.07, respectively, which payments were in full for all current use oil delivered prior to March 31, 1908. On May 22, 1908, said bank made demand upon said Railroad Company for payment of oil delivered subsequent to April 11, 1908, to which said Railroad Company replied by letter on May 28, 1908, to the effect that said oil companies had defaulted in their contract and that there was nothing due said oil companies.

On November 5, 1910, this action was commenced for an accounting, to ascertain the amount of oil delivered under said contract, and to obtain a judgment against said Railroad Company for the amount of oil delivered, and also to obtain a judgment against the defendant Sunset Road Oil Company for the difference between the amount found to be due from said Railroad Company and the amount advanced by said bank to said oil companies. Said oil companies delivered no storage oil whatever, nor did they deliver current use oil of the quality or in the quantity re-

quired, said Railroad Company being obliged to purchase seventy-five per cent of its current use oil from outside sources. Neither did said oil companies ever repay to said Railroad Company any part of said sum of \$60,000, but against that sum said Railroad Company has allowed a credit of \$10,905.23 for current use oil delivered subsequent to April 1, 1908, and for which no payment had been made.

The complaint alleges, on information and belief, that the total value of the oil delivered to said Railroad Company subsequent to April 11, 1908, was approximately \$15,000, of which said bank advanced the sum of \$14,125, and that \$4,309 has been paid, leaving a balance due of \$11,000, or thereabouts. The defendant Sunset Road Oil Company defaulted. The defendant Railroad Company answered by joining issue as to the value of the total shipments of oil, the amount claimed to have been advanced by said bank to said oil companies, and the assignment to said bank. It denied that it had received notice of said assignment, as alleged in the complaint, or that it had accepted or agreed to accept the same, or that it had made any payments pursuant to said assignment, but admitted that it had made payments to said bank for oil shipped prior to April 1, 1908. As a special defense it was averred that said oil companies had defaulted in the performance of their contract, by reason of which nothing was due or payable to said oil companies subsequent to April 1, 1908, at which time it was alleged said oil companies were, and that they still are, indebted to said Railroad Company, in excess of the sum of \$40,000. In other words, the answer sets up, in addition to other defenses, its right to recoupment under the terms of said original and supplemental agreements. The trial court found that said Railroad Company, by reason of its conduct at the time of and subsequent to the notice of assignment, was estopped from urging its defense of recoupment, and judgment was entered in favor of plaintiff.

Two principal questions are presented by the appeal; first, whether or not appellant may recoup itself against plaintiff to the extent of its claim against plaintiff's assignor, occasioned by the total failure of said assignor to deliver storage oil paid for in full, and second, if it may so recoup itself, whether or not, under the facts shown by the record,

appellant is estopped by reason of its conduct from urging that defense.

The availability of the defense of recoupment depends primarily upon the nature of the contract. If, as contended by appellant, it is an entire contract and not a divisible one, it is quite clear that it is a proper case for recoupment. This proposition is not seriously disputed. Respondent argues that the contract is a divisible one, not that the original and the two supplemental agreements do not constitute one contract, but that the contract covers two separate obligations, distinct from each other, viz.: an agreement to deliver storage oil, and an agreement to deliver current use oil, and that since the storage oil was paid for in advance such payment cannot now be used as the foundation for recoupment in the matter of the delivery of and the payment for the current use oil.

We are of the opinion that the terms of the contract and the circumstances of its execution do not support this view.

[1] The divisibility of the contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract. If it was the intention of the parties to treat the contract as an entire contract, and it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed, it is not a divisible contract, and the contracting parties will not be allowed, under those circumstances, to perform part of the contract and default in its other parts without being held answerable for the performance of the entire contract. (2 Parson on Contracts, 9th ed., p. 517; 3 Page on Contracts, p. 2289; 6 Ruling Case Law, 858; 13 Corpus Juris, 562.)

[2] The evidence here shows that the defendant Railroad Company was in need of oil to operate its railroad. It was not in the business of buying and selling oil. The oil contracted for was purchased for its own use and consumption. It was necessary that it should be continuously supplied with oil for its immediate and future use. A supply of current use oil without a supply of storage oil would have been of little value. Both were necessary to the successful operation of its railroad business. At the time of the execution of the contract the oil fields belonging to said oil com-

panies were apparently new and undeveloped. Money was needed for their development. In order to secure the required supply of oil, either for current use or for storage, it was necessary for said Railroad Company to finance such development. This it did by advancing \$60,000 to said oil companies. This sum was not advanced for the development of storage oil exclusively, nor for the development of current use oil alone, but it was advanced for the development of the production of both. It was paid for the purpose of facilitating such development, so as to insure a steady flow of current use oil as well as an accumulation of storage oil. The fact that it was agreed that said \$60,000 should be applied as payment for storage oil is immaterial. It was advanced for the purpose of developing the oil properties of said oil companies, so that both oil for current use and storage oil might be produced. It is not reasonable to suppose that said railroad company would have advanced the sum of \$60,000 without feeling assured that it was going to be furnished with current use oil during the five-year period covered by the contract, as well as with the storage oil. On the other hand, it is apparent that said oil companies would not have taken a contract to furnish current use oil alone at the price agreed upon without the privilege of also furnishing the additional two hundred thousand barrels of storage oil. Nor would they have entered into the second supplemental agreement to furnish the current use oil if said \$60,000 had not been advanced. It will thus be seen that the obligations of the contract to furnish storage oil and current use oil cannot be separated. The contract provided that "all oil required to be used during said term [five years] by the buyer for all its purposes," etc., should be furnished. These reasons make it plain to us that the intention of the parties was to treat the contract as a whole, and that the payment of said sum of \$60,000 was made and accepted by the parties accordingly.

[3] We have then a case where the cause of action of the plaintiff on the assigned demands for the delivery of current use oil, and the right of the defendant to recoup on account of the \$60,000 advanced to plaintiff's assignor for development purposes, grew out of and had their origin in the same subject matter and in the same contract. Under such circumstances recoupment was proper. (*American Bridge Co.*

v. *City of Boston*, 202 Mass. 374, [88 N. E. 1089]; *Rockwell v. Daniels*, 4 Wis. 452; *Newfoundland v. Newfoundland Ry. Co.*, L. R. 13 App. Cas. 199; *Salt Fork Coal Co. v. Eldridge Coal Co.*, 170 Ill. App. 268; *Seibert v. Dunn*, 216 N. Y. 237, [110 N. E. 447]; 34 Cyc. 623, 625, 643, 376, 695.)

In respondent's brief numerous authorities are cited on this point. It is unnecessary to discuss them, however, more than to say that they are based upon the theory that the contracts under consideration in those cases were divisible, which, as we have seen, is not the case here.

The exact time when said oil companies breached their contract, whether it was prior or subsequent to the notice of assignment can make no difference so far as the application of the doctrine of recoupment is concerned. If we were here dealing with the question of setoff instead of that of recoupment a different rule would doubtless prevail. There is a marked difference between the two doctrines. The chief distinctions are that the former is a creation of statute, while the latter existed at common law; and that the former is applicable when there are different contracts, while the latter flows from the same contract as that which forms the foundation of plaintiff's claim. If the breach here occurred prior to the notice of assignment there would be no question but that the assignee took the rights of the assignor subject to all equities, setoffs, and other defenses then existing. (Sec. 368, Code Civ. Proc.) A complete breach did not occur, however, until the last days of April or early in May, 1908, which was subsequent to the notice of assignment. In the contract it was provided that deliveries of storage oil should commence on April 1, 1908, and that the failure by the sellers to load cars for more than ten consecutive days should not be considered a breach of said agreement, but that, in case of such failure to load the same, the party in default should be required to fully make up the deficiency within twenty days, which allowed said oil companies until the end of April before they were completely in default. During the last days of April or early in May, however, the representative of the Railroad Company called personally on the representatives of the oil companies to ascertain what said oil companies intended to do about fulfilling their contract. at which time the representatives of the oil companies stated: "We can't furnish the oil



either in the quantity or quality stated in the contract, and we will have to quit—throw it up.” This constituted a complete breach of the contract, and it having occurred subsequent to the notice of assignment, and the action of the assignee having been commenced subsequent to such breach, the Railroad Company was given the right to recoup as against plaintiff’s assignor to the extent of its claim arising because of such breach.

This rule of law is best illustrated by the case of *American Bridge Co. v. City of Boston*, *supra*, wherein a contractor, on April 10, 1902, assigned certain payments due him to a bank, notice of which assignment was given on November 14, 1902. A few days subsequent to the notice of assignment the assignor abandoned the contract. Action was brought on the assignment in October, 1906. The defendant pleaded recoupment on account of the damage suffered by reason of the breach of the contract. It was held that although the breach occurred subsequent to the notice of assignment recoupment was a proper defense. The decision in that case is based upon the ground that the right of the defendant to claim damages for the nonperformance of the contract existed at the time of the making of the contract, at the time of assignment, and at the time of the notice of assignment, and that the assignees knew it, and they also knew it would become available to the defendant the moment the assignor should commit a breach. It is further stated in the opinion in that case that even if the sums sued upon were due at the time of the notice of assignment, still, if the action was brought by the assignor after default, there could be no doubt that the defendant would have the right to recoup damages suffered by such default, the court saying, “And the assignees who seek to enforce this claim can stand in no better position in this respect than the assignor. The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge; and since they have delayed suit for these sums until after default, the defendant may recoup against them as it could have recouped against the assignor.”

Neither is the situation changed by the fact that the bank did not know of the existence of the second supplemental agreement at the time of said assignment. As assignee it

took subject to all equities and defenses between the original parties to the agreement existing at the time of the assignment. Those rights were not confined to those parts of the contract known to the assignee, but they embraced the equities and defenses covered by the entire contract. (*Fleming v. Law*, 163 Cal. 227, [124 Pac. 1018]; *San Jose Ranch Co. v. San Jose Land Co.*, 132 Cal. 582, [64 Pac. 1097]; 5 Corpus Juris, 963, note 28.)

In view of the authorities above cited it is our opinion that appellant should not have been deprived of its right to recoup, unless it was estopped from doing so by its acts and conduct.

[4] The facts upon which the doctrine of estoppel was applied against appellant have already been related in the first part of this opinion. In this respect it is contended by respondent that, on April 8, 1908, when appellant was notified of the assignment to the bank, appellant should have notified the bank that it had a claim, or intended to make a claim, against said oil companies because of the payment of said sum of \$60,000; that instead of doing so it sent the assignment back to the oil companies for corrections as to the form of the assignment, and with instructions as to how the assignment should be drawn in the future; that the bank thereafter, acting in pursuance of these instructions, presented future assignments to appellant, which appellant accepted, and on April 15 and 16, 1908, made payments to the bank for current use oil in the aggregate sum of \$4,328.85. From these facts respondent argues that the bank was lulled into a state of financial security and encouraged to make the advances to said oil companies.

The weakness of respondent's whole contention is, however, that the bank did nothing and said nothing which would indicate to appellant that it had advanced or intended to advance to said oil companies any money on its shipments of oil. Appellant was in total ignorance of that fact. Respondent claims that that part of the oil companies' letter of April 8, 1908, wherein it was stated, "This order to remain in full force and effect until revoked by us with the consent of said Kern Valley Bank," was of itself sufficient notice that the rights of the bank were absolute. While the language quoted may have indicated in a vague fashion that the bank had some interest in said payments which

could not be canceled without its consent, the letter does not carry the effect contended for by respondent. On the contrary, the letter as a whole appears to be only a direction to make payments to said bank, without disclosing any interest which the bank may have had. It does not even state in positive terms that an assignment had been actually made, and there is nothing contained in the letter from which it can even be inferred that the bank was making advances to said oil companies on shipments of oil to appellant. If any assignment can be inferred from said letter at all it could with more assurance be assumed therefrom that the assignment was made in satisfaction of or to apply upon a past indebtedness, or that it should apply upon some particular trust, or that the bank was acting as a depository for said oil companies merely for the purpose of receiving the funds. The fact that appellant did not assume the burden of fully informing said bank of the extent of its dealings with said oil companies does not create the barrier of an estoppel. It had the right to assume that the bank was fully informed as to the second supplemental agreement and of the payment of said sum of \$60,000, when it is taken into consideration that one of the directors of said bank was the general manager of one of said oil companies and the president of the other during all of these transactions.

[5] Before respondent can successfully urge estoppel it must be shown that respondent was not only destitute of knowledge of the real facts, but that it was without convenient or ready means of acquiring such knowledge. (*Murphy v. Clayton*, 113 Cal. 153, [45 Pac. 267]; *Huse v. Den*, 85 Cal. 390, [20 Am. St. Rep. 232, 24 Pac. 790]; 16 Cyc. 738.)

[6] No estoppel arises where a party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself. (16 Cyc. 741.) It is plain to be seen that had said bank made such inquiries as the law enjoined upon it to make prior to or at the time of said assignment the present controversy would not have arisen. Nor does the fact of the payments by said Railroad Company to said bank, on April 15 and 16, 1908, justify an estoppel. Those payments covered deliveries of current use oil made prior to April 1, 1908, which was eight days prior to the so-called notice of assignment.

[7] In order to constitute an estoppel it must

be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped. There must be an intentional deceit or gross negligence shown (*Lackmann v. Kearney*, 142 Cal. 112, [75 Pac. 668]), and if silence is relied upon to constitute the estoppel, such silence must be willful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict. (*Eltinge v. Santos*, 171 Cal. 278, [Ann Cas. 1917A, 1143, 152 Pac. 915].) But where there is no duty to speak mere silence will not create an equitable estoppel. (*Winans v. Sierra Lumber Co.*, 66 Cal. 61, [4 Pac. 952]; *Lux v. Haggin*, 69 Cal. 255, [4 Pac. 919, 10 Pac. 674].)

Under the facts above related, and in view of the authorities cited, it is our opinion that the doctrine of equitable estoppel does not apply.

Judgment reversed.

Waste, P. J., and Richards, J., concurred.

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[Crim. No. 496. Third Appellate District.—May 3, 1920.]

THE PEOPLE, Respondent, v. DAN NUNES, Appellant.

- [1] **CRIMINAL LAW—MAYHEM—PREMEDITATED INTENT—EVIDENCE.**—In a prosecution for the crime of mayhem, it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime in order to sustain the charge, notwithstanding the word "maliciously" as used in section 203 of the Penal Code, in which that crime is defined, might imply otherwise.
- [2] **ID.—UNLAWFUL STRIKING OF ANOTHER—RESULTANT LOSS OR DISFIGUREMENT.**—If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem.

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1. Malice and premeditation as element of offense of mayhem, note, *L. E. A.* 1916F, 494.

2. What constitutes mayhem, note, 65 *Am. St. Rep.* 771.

- [3] **ID.—DISFIGUREMENT OF EYE — EVIDENCE — FINDING.**—While under the statute the mere disfigurement of an eye would not amount to mayhem unless such disfigurement resulted in rendering the eye useless, in this prosecution the jury were warranted in finding, as their verdict implies they did find, that the defendant by the blow he delivered in and upon the face of the prosecuting witness "put out" the eye of the latter.
- [4] **ID.—"PUT OUT THE EYE"—MEANING OF EXPRESSION.**—The expression or phrase "put out the eye," contained in section 203 of the Penal Code, means that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life.
- [5] **ID.—EFFECT OF TESTIMONY GIVEN ON CROSS-EXAMINATION—PROVINCE OF JURY.**—In a prosecution for the crime of mayhem, if the direct testimony of the doctor who treated the prosecuting witness after the injury was inflicted upon the latter's eye is sufficient to sustain a verdict of guilty, but there are statements brought out on his cross-examination which are calculated to weaken his direct testimony in its tendency to show that the eye of the prosecuting witness was put out, it is for the jury to consider and determine what weight they should give his direct testimony when considered by the light of statements made on his cross-examination.
- [6] **ID.—BURDEN OF PROOF—SUFFICIENCY OF INSTRUCTIONS.**—In a prosecution for the crime of mayhem, it is not error to refuse to read to the jury a requested instruction that they must find from the evidence that the defendant put out the eye of the complaining witness or they must acquit him, where the court, after stating to the jury in detail the contents of the information and reading to them section 203 of the Penal Code, upon which the information is based, tells them that, to justify a verdict of guilty, it rested upon the prosecution to prove beyond all reasonable doubt that "said defendant is guilty of the crime charged against him in the information."

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. M. Inman for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

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3. Mayhem as dependent on part of body injured and extent of injury, note, 16 A. L. R. 955.

HART, J.—Defendant was informed against by the district attorney of the county of Sacramento for the crime of mayhem. Upon a trial he was found guilty and he prosecutes this appeal from the judgment of conviction and from an order denying his motion for a new trial.

Louis Dulmaine, the prosecuting witness, was engaged as a bartender in a building at the corner of Seventh and L Streets, in the city of Sacramento, his hours of duty being from 5 o'clock P. M. until closing time the next morning. He was so engaged on the night of June 29, 1919, closed his saloon at 2 o'clock on the morning of June 30th, and, about half an hour later, he and two other men started walking up Seventh Street toward K. Before reaching K Street they met the defendant, accompanied by a woman, approaching them. According to the testimony of the prosecution, at about that time one of Dulmaine's companions was inviting the other members of the party to his house to partake of a chicken dinner. Defendant said: "What's that? What the hell's that about chicken?" and used some vulgar language. Dulmaine turned around and wanted to know "what was the matter with that guy," and asked: "What's it to you?" or words to that effect, upon which defendant struck Dulmaine in his right eye. He was wearing glasses at the time and the result of the blow was that they were broken and a piece of glass entered the eyeball, the prosecution claiming that thereby the sight of his right eye was destroyed.

Section 203 of the Penal Code defines mayhem as follows: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

[1] It has been held that it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime of mayhem in order to sustain that charge, notwithstanding that the word "maliciously" as used in section 203 might imply otherwise. In *People v. Wright*, 93 Cal. 564, [29 Pac. 240], it is said: "... It therefore follows that as malice aforethought is not an essential element in the crime of mayhem, proof of premeditation or deliberation is not required. But the requirements of the statutes in such

cases will be fully met by proof of the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously—that is, ‘with a wish to . . . injure another person, or an intent to do a wrongful act’—unless the evidence tends to show to the contrary.” In other words, it is held in that case that it is sufficient to prove only the commission of the act, from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show that it was done under circumstances constituting self-defense.

[2] If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem. (See *Terrell v. State*, 86 Tenn. 523, [8 S. W. 212]; *Worley v. State*, 11 Humph. (Tenn.) 172, 175.)

The appellant, however, does not seem to question the law as it is above stated, but his main contention is that the evidence fails to show that the defendant did “put out the eye” of the prosecuting witness within the meaning of section 203 in that particular. It is further contended that the court erred to the prejudice of the defendant by refusing to give one of his requested instructions.

[3] We agree with counsel for the defendant that under the statute the mere disfigurement of an eye would not amount to mayhem unless such disfigurement resulted in rendering the eye useless; but we think the jury were warranted in finding, as their verdict implies that they did find, that the defendant by the blow he delivered in and upon the face of the prosecuting witness “put out” the eye of the latter.

Dr. Briggs, a noted oculist, examined and treated the eye of the complaining witness after the injury was inflicted upon the latter’s eye by the defendant. He testified on direct examination as follows:

“Mr. Russell: Q. Do you know Mr. Louis Dulmaine, the gentleman back here? A. I do. Q. You have had occasion to treat him? A. I have. Q. For what sort of trouble was that, Doctor? A. He came in on the second day of July, last, with an injured eye, that had been injured, he said, I

think, two or three days previously. There was a penetrating wound of the cornea, penetrating the iris, and a punctured lense; the lense of the eye was punctured, causing cataract; causing the lense to become opaque, which we call cataract. Q. Did you treat the eye? A. I did. Q. What is the condition of the eye in reference to sight? A. The eye is practically blind. He sees light; that is all. He doesn't see objects. Q. The sight, then, is what we call destroyed? A. He is practically blind. Q. He is practically blind in that eye? A. Yes, sir. Q. All that he can distinguish is just light? A. Yes, sir. I think he can—he sees motions that are made past the eye. Q. Is that a permanent injury, Doctor? A. Yes. Q. That is an injury such as can not be cured? A. Well, yes; I can say that his chances of ever seeing any more are almost nil. Q. Now, you say there was a sort of a wound in that eye? A. A puncturing wound, yes; about, I think, a sixth of an inch long, that went through the clear part of the eye. Q. Could you tell from the nature of the wound what that might be caused by, Doctor? A. Well it might be caused by any sharp thing projected against the eye. It might have been a knife wound, a glass wound, or anything else that struck the eye with force enough to cause that kind of injury. It was more like a cut than a bruise. It was a clean-cut wound. Q. That would indicate that force had been used on it? A. Oh, yes."

There can be no manner of doubt that the foregoing testimony, taken alone, unmistakably shows that the complaining witness' eye was put out. If all that the injured party could do with the eye was, as the doctor testified, merely to distinguish lightness from darkness or perceive a motion or movement of some sort made immediately before the eye, the eye was certainly rendered perfectly useless to its possessor. If both eyes were so afflicted, it is very clear that the complaining witness would practically be blind. [4] What the statute obviously means by the expression or phrase, "put out the eye," is that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life.

But counsel for the defendant, in his contention that the eye of the complaining witness was not shown to have been "put out," relies mainly upon the following testimony



brought out on the cross-examination of Dr. Briggs: "Hardly a likelihood of his ever having any use of that eye for visual purposes. . . . I wouldn't say it is impossible for him to get some vision in it. Possibly in a year or two years it may improve; but I think the chances of doing so are so slight that I don't know that it would be worth attempting. Q. But, in your judgment and experience, you wouldn't say that there isn't any chance? A. Oh, no. Q. In other words, there is a chance? A. There is a chance of getting some sight, but so little chance of getting any useful sight that I wouldn't consider it in human events at all possible—I wouldn't say possible—at all probable. . . . I should say he might have a chance in a hundred of getting some useful sight, and I would say that was hardly a probability either; and in the effort to get it, it might do a lot of harm. So it would be a question in my mind whether I would ever advise him to have an operation done with a view to improving the sight; I don't know; I wouldn't say; I wouldn't know, because I would have to see the eye at some other time, in some other condition. I might feel that in a year or two years' time it might be advisable to do an operation upon it. I wouldn't say it wasn't possible, now, in the course of human events; but I think it is improbable."

There is nothing in the foregoing testimony of Dr. Briggs which would justify us in holding that the verdict is not sufficiently supported. The full purport or the effect of the doctor's testimony upon cross-examination is that, while it is not impossible that "in the course of human events" and at the end of about two years an operation could be performed upon the eye which might have the effect of restoring to it some power of sight, still it was not probable that thus such a result could be brought about. Indeed, it would seem to be very clear from the doctor's testimony as a whole that he was at the time of the trial of the opinion that the injury to the eye could not be so amended or corrected as to enable the complaining witness to use it at any time in the future for any useful or practical purpose whatever. [5] At all events, the direct testimony of the doctor amply sustains the verdict, and if there were any statements brought out on his cross-examination which were calculated to weaken his direct testimony in its tendency to show that the eye was put out, it was for the jury to consider and de-

termine what weight they should give his direct testimony when considered by the light of statements made on his cross-examination.

Our conclusion is, as above stated, that the verdict derives sufficient support from the evidence to uphold it.

The instruction referred to above as having been proposed by the defendant and disallowed by the court is this: "You are instructed that you must find from the evidence that the defendant, Dan Nunes, put out the eye of the complaining witness or you must acquit him."

[6] One of the grounds upon which the court refused to read the instruction to the jury was that the proposition therein stated was covered by the general charge of the court, and this we find to be substantially true. In its initial instruction the court stated to the jury in detail the contents of the information, thus telling them, as the statute describes it, the nature of the charge upon which the defendant was being tried, and then stated that the issue had been made by a plea of not guilty by the defendant to the information. The court also read to the jury section 203 of the Penal Code, upon which the information is based, and told the jury that, to justify a verdict of guilty, it rested upon the prosecution to prove beyond all reasonable doubt that "said defendant is guilty of the crime charged against him in the information." The accusatory pleading specifically charged the defendant with unlawfully and maliciously putting out the eye of the complaining witness. It would seem that the jury would certainly be minus that degree of intelligence which it must be assumed the average person usually summoned to jury duty possesses if it could be said, as a matter of law, that they did or could not understand from the initial instruction of the court that the defendant would be entitled to an acquittal unless it were shown beyond all reasonable doubt that he had put out the eye of the complaining witness. Indeed, the only question submitted to the jury was whether the defendant did put out the eye of the prosecuting witness; that was the single specific charge in the information; and when told in general language that the charge in the information was required to be established beyond all reasonable doubt to justify a conviction, that was tantamount to telling the jury that if the people failed to prove by the degree of proof mentioned that defendant put

out the eye of the complaining witness, the former would be entitled to an acquittal.

There are no other points submitted here for consideration.

The judgment and the order appealed from are affirmed.

Nicol, P. J., *pro tem.*, and Burnett, J., concurred.

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[Civ. No. 3083. Second Appellate District, Division One.—May 3, 1920.]

M. G. HILL, Respondent, v. M. MOORE et al., Appellants.

- [1] **PLEADING — ACTION ON PROMISSORY NOTE — SUFFICIENCY OF ANSWER.**—In an action upon a promissory note, it is error to enter judgment against the defendants upon the pleadings where their answer not only contains an express denial of the material allegation contained in the complaint as to nonpayment, but specifically alleges that the entire amount of principal and interest due upon the note has been fully paid.
- [2] **ID.—MOTION FOR JUDGMENT — AFFIRMATIVE DEFENSES DEEMED TRUE.**—Upon a motion for judgment upon the pleadings, all matters affirmatively set up in the answer of the defendants must be deemed to be true.
- [3] **ID.—CONSIDERATION—AGREEMENT TO RELEASE DEFENDANTS FROM PAYMENT—SUFFICIENCY OF DEFENSE.**—In an action upon a promissory note, proof that a part of the consideration for defendants' transfer and assignment of a certain lease was plaintiff's agreement to release them from the payment of the note sued on would constitute a sufficient defense to plaintiff's right to recover.

**APPEAL** from a judgment of the Superior Court of Imperial County. E. A. Luce, Judge presiding. Reversed.

The facts are stated in the opinion of the court.

Conkling & Brown for Appellants.

Dan V. Noland and J. S. Larew for Respondent.

**SHAW, J.**—Appeal by defendants from a judgment entered against them upon the pleadings.

The action was upon a promissory note for six hundred dollars, the making of which is admitted. Defendants in their answer not only denied the allegation of the complaint "that no part of the principal sum, nor interest, or attorney's fee therein provided, has been paid," but affirmatively alleged that the whole thereof has been fully paid, and denied "that the whole thereof, or any part thereof, is now due or owing or unpaid." And, as a further defense, alleged that the note in question was given as a part of the consideration in the purchase of a lease of real estate transferred by plaintiff to defendants, and that thereafter defendants sold and assigned their interest in the said lease and the crops growing upon the demised premises to F. M. Griffith and H. W. Thompson, and that as a part of the consideration for the sale and transfer thereof so made, plaintiff at the time agreed with defendants that they should be released from the payment of said six hundred dollar note, which should be returned to them.

[1] It thus appears the answer not only contained an express denial of the material allegation contained in the complaint as to nonpayment, but specifically alleged that the entire amount of principal and interest due upon the note had been fully paid. This alone constituted a sufficient defense to the allegations of the complaint. [2] Moreover, the matters affirmatively set up in the answer must, under the motion for judgment upon the pleadings, be deemed to be true. (*McGowan v. Ford*, 107 Cal. 177, [40 Pac. 231]; *Bradford Investment Co. v. Joost*, 117 Cal. 211, [48 Pac. 1083].) [3] And since it is alleged that a part of the consideration for defendants' transfer and assignment of the lease was plaintiff's agreement to release them from the payment of the note, proof of such fact would constitute a sufficient defense to plaintiff's right to recover on the note.

That the court erred in granting plaintiff's motion for judgment on the pleadings, followed by entry of the judgment therein, admits of no possible question.

The judgment is therefore reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 3183. First Appellate District, Division One.—May 3, 1920.]

CHARLES L. OLDS, etc., Respondent, v. ETTIE B. H. THORINGTON et al., Appellants.

- [1] **QUIETING TITLE — DECREE DIRECTING PAYMENT OF MORTGAGE — FINALITY OF JUDGMENT.**—In an action to quiet title, a judgment decreeing that the plaintiff is the owner of the property, subject only to a mortgage lien of the defendants, and that upon the payment of such mortgage lien the plaintiff will be entitled to a decree quieting his title to the premises, is final and not interlocutory in its character.
- [2] **HOMESTEAD—RESIDENCE UPON PREMISES—OMISSION OF STATEMENT FROM DECLARATION.**—Where a declaration of homestead does not contain a statement that the person making it is residing on the premises claimed as a homestead, the homestead is void.
- [3] **ID.—OMISSION FROM DECLARATION — EXTRANEOUS EVIDENCE INADMISSIBLE.**—The right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence.

**APPEAL** from a judgment of the Superior Court of Inyo County. Wm. D. Dehy, Judge. **Reversed.**

The facts are stated in the opinion of the court.

W. A. Lamar and A. H. Swallow for Appellants.

L. C. Hall, S. E. Vermilyea and S. L. Carpenter for Respondent.

**KNIGHT, J., pro tem.**—The judgment in this action decreed that plaintiff's title to certain lands situate in Inyo County be quieted upon the payment by plaintiff to defendants of the amount of a mortgage previously given by plaintiff's predecessors covering the lands in question. Defendants appeal. Plaintiff, in his own right and as executor of the last will of Martha D. Olds, deceased, avers in his complaint that he is the owner and entitled to the possession of the disputed premises, and prays that his title thereto be quieted. Defendants in their answer deny the validity of

plaintiff's title, and by way of cross-complaint seek to reform a certain deed which forms a part of their chain of title by correcting the description of the property intended to be conveyed, and thereupon to quiet their title, which they aver was acquired by prescription. Defendants also plead the statute of limitations. (Sec. 318, Code Civ. Proc.)

Plaintiff is the son of David and Martha D. Olds, both of whom are now deceased. Defendants are, respectively, the widow and the children of William R. Thorington, since deceased, the latter being a son of Martha D. Olds by a former marriage. The premises in question were acquired in the year 1874 by David and Martha D. Olds subsequent to their marriage, and are conceded to be community property, upon which David Olds, on August 11, 1881, filed a homestead. On June 27, 1891, said William R. Thorington loaned David Olds and wife two thousand five hundred dollars, for which they gave him a note, secured by a mortgage purporting to cover the premises in question. For the purpose of satisfying that mortgage David Olds, on February 24, 1894, executed and delivered to Thorington a deed to said premises. Martha D. Olds did not join in that deed. The mortgage was immediately afterward satisfied of record. After said deed to Thorington had been executed and delivered Olds and his wife continued to reside upon said premises, until the death of Olds, which occurred on January 16, 1909, at which time Thorington, who had been living with his wife on what is called the "Horton" ranch, moved on to the Olds place, his wife remaining on the Horton place. Thorington then lived with his mother, Mrs. Olds, on the Olds place, keeping house for her, until January, 1910, when he moved back to the Horton ranch to reside with his wife. Thereafter Mrs. Olds resided alone upon the Olds place until the 1st of August, 1913, at which time Thorington, with his wife and family, moved on to the Olds place, and jointly occupied the dwelling thereon with Mrs. Olds. Thorington died on November 2d of the same year, after which Mrs. Olds and the Thorington family continued to occupy the Olds dwelling until the death of Mrs. Olds, which occurred January 17, 1914, and since then Thorington's widow and children have occupied said premises and dwelling.

Three main issues were presented by the pleadings, viz.: The validity of plaintiff's title, the right of defendants to reform the deed executed by David Olds to Thorington in 1894, and defendants' asserted title by prescription.

The foundation of plaintiff's title is the homestead declared by David Olds in 1881. If, as contended by appellants, the homestead is void, title to said property was vested in Thorington by the deed executed by Olds in 1894, for the reason that, in the absence of a valid homestead, Olds possessed the power, under the provisions of section 172 of the Civil Code, as that section existed at the time of this transaction, to dispose of the community property, other than by testamentary disposition, the same as he would if it were his separate estate. If, however, said homestead is valid, said deed is inoperative, and the question of whether or not plaintiff's title, acquired under said homestead, has been defeated by the asserted prescriptive title of defendants, becomes necessary for determination. The matter of the reformation of said deed becomes material only in the event that defendants' title is found to depend upon said deed.

The trial court found specifically on all of the issues of fact presented by the pleadings, from which it evidently concluded that said homestead was valid, and that defendants' title by prescription had not been established, although in its conclusions of law and in its judgment neither of those matters were specifically determined. It found that the description in the Thorington deed was intended to cover the premises in question, but it declined to grant relief toward the reformation of said deed, upon the ground that even if reformed said deed "would still be inoperative to pass or convey his title to the lands and premises" in question, and as to defendants' prescriptive title it found that the possession of said premises by Thorington was a joint possession with that of Olds and his wife, and was not an exclusive, hostile, and adverse one, and that the only exclusive possession by the Thoringtons had been since the death of Mrs. Olds, which occurred January 17, 1914. The court's conclusions of law and its judgment were, in effect, that by reason of said mortgage and deed Thorington and his successors became mortgagees in possession, and that plaintiff's title should not be quieted until said mortgage is

paid. The judgment, which follows strictly the conclusions of law, decrees that the defendants and cross-complainants are entitled to retain possession of said premises until plaintiff pays to defendants and cross-complainants the sum of \$3,297.50, the amount found by the court to be due on said mortgage from Olds and his wife to Thorington, and that upon the payment of said sum said debt will have been fully paid, and plaintiff will thereafter be the owner in fee simple of said premises, subject only to the administration of the estate of Martha D. Olds, deceased, and that upon the payment of said sum plaintiff will be entitled to a decree quieting his title to said premises.

[1] Preliminary to the main questions presented by the appeal, respondent contends that the appeal should be dismissed upon the ground that said judgment is interlocutory in its character and not final. We are of the opinion that the point is not well taken. The form of judgment is one falling within the rule stated in *Zappettini v. Buckles*, 167 Cal. 27, [138 Pac. 696], in which it is held that if after a decree has been entered no further proceedings can come before the court, except such as are necessary to carry the decree into effect, the decree is final. Under the provisions of the judgment in this action no further judicial action on the part of the court is necessary to a final determination of the rights of the parties. The amount to be paid by plaintiff before he is entitled to relief has been definitely fixed and determined by the court, and upon said payment plaintiff *ipso facto* becomes entitled to a decree quieting his title. Nothing remains to be done by the court except to carry the decree into effect, which, as we have seen, does not render the decree interlocutory in its character. We do not consider the case of *Krotzer v. Clark*, 178 Cal. 736, [174 Pac. 657], relied upon by respondent, in point, for the reason that the decree in that case was apparently rendered and intended by the court as an interlocutory decree. Furthermore, the entry of the final decree in that case depended upon the tender of a deed and a certificate of title showing the names and widths of all streets and roads touching the property, which, if tendered, may have given rise to further questions for judicial determination as to the sufficiency of said deed and certificate. The other authorities cited by respondent (*Bateman v. Gits*, 17 N. M. 619, [133 Pac. 969];



Elliott on Appellate Procedure, sec. 83; Freeman on Judgments, 4th ed., secs. 29, 34) are not in conflict with the views expressed in *Zappettini v. Buckles*, *supra*.

[2] The first question presented on the merits of the appeal is the one relating to the validity of the homestead. If the homestead is void plaintiff has no title upon which to base his action. Several objections are urged against its validity, the most important of which is that the declaration contains no statement that the person who makes it is residing on the premises claimed as a homestead. A copy of the declaration of homestead is as follows:

"Know all men by these presents, that I, David Olds, of Round Valley, county of Inyo, state of California, a married man and the head of a family, residing with my family on the northwest one quarter section twenty-eight, township six south, range thirty-one east, do hereby declare my intention to claim as a homestead the N. W.  $\frac{1}{4}$  Sec. 28, T. 6 S., R. 31 E., less 32 feet in width off the east side of said section conveyed to William Horton and less 31 rods wide off the west side of said section conveyed to W. R. Thorington, and the actual cash value I estimate at three thousand dollars.

"In witness whereof, I have hereunto set my hand and seal this, the 10th day of August, A. D. 1881.

"DAVID OLDS. (Seal)"

It will be observed that the declarant declares that he resides on the northwest quarter of section 28, which, according to the description immediately following in the homestead, consists of three distinct parcels of land, two of which the declarant does not own. He fails to specify, however, on which of those three parcels he was then residing. In other words, it cannot be determined from the declaration whether the declarant was then residing on the thirty-two foot strip on the east side of said quarter-section, or on the thirty-one rod strip, on the west side of said quarter section, or on the mid parcel which he afterward attempts to select as a homestead. We are of the opinion that such omission is fatal.

Section 1263 of the Civil Code, as it read at the time of the filing of this declaration, required that a declaration of homestead must contain a statement "that the person making it is residing on the premises and claims them as a

homestead." If the statement of residence, or any of the other statements required to be made by said section, is omitted the homestead is void. It was said in *Jones v. Gunn*, 149 Cal. 687, [87 Pac. 577]: "While it is true that homestead and exemption laws are remedial and, generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction. Indeed, the supreme court of this state has generally held that homestead claimants must quite strictly comply with the statutory requirements as (formerly) to wife's acknowledgment (*Beck v. Soward*, 76 Cal. 530, [18 Pac. 650]); as to head of family (*Reed v. Englehart-Davidson etc. Co.*, 126 Cal. 527, [77 Am. St. Rep. 206, 58 Pac. 1063]); as to residence on premises (*Boreham v. Byrne*, 83 Cal. 27, [23 Pac. 213]); as to statement of husband's failure to make declaration (*Cunha v. Hughes*, 122 Cal. 113, [68 Am. St. Rep. 27, 54 Pac. 535]); and as to estimate of the actual cash value of the premises, etc. (*Tappendorff v. Moranda*, 134 Cal. 421, [66 Pac. 491])."

And in *Tappendorff v. Moranda*, 134 Cal. 419, [66 Pac. 491]: "The right to a homestead and to enjoy the privileges and immunities incident thereto is purely of statutory creation, and exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a homestead upon a tract of land is mandatory and cannot be dispensed with."

In *Boreham v. Byrne*, 83 Cal. 23, [23 Pac. 212], it was held that where the declarant stated that he was "in possession" of certain described premises which he claimed as a homestead it was not the equivalent of the required statement of residence. It was there said: "Nothing could make the premises a valid protected homestead without such a declaration as the statute required. Actual residence on the land would not so make it, in the absence of a sufficient declaration. A declaration sufficient in form without residence, and residence without a sufficient declaration, are alike insufficient to constitute a homestead."

The case of *Harris v. Duarte*, 141 Cal. 497, [70 Pac. 298, 75 Pac. 58], was one in which it was shown that a parcel of land on which the declarant resided was not the one described in the declaration, and the court held the error to be fatal, saying: "A declaration of homestead must contain a description of the premises claimed and a statement that the person making it is residing on the premises described."

Respondent endeavors to sustain the homestead by invoking the doctrine of liberal construction, as stated in *Southwick v. Davis*, 78 Cal. 504, [21 Pac. 121] and in *Schuyler v. Broughton*, 76 Cal. 524, [18 Pac. 436]. But the facts of those cases are quite dissimilar to the facts of the case at bar. In both of those cases the question of the statement of value was involved. In the former case it was stated in the declaration that the value "does not exceed five thousand dollars," and in the latter case the statement was, "We do not place the value of said land at a sum not to exceed one thousand six hundred dollars." In both cases it was held that the words used were sufficiently definite to convey an expression of an opinion of value.

[3] Respondent further contends for the application of the rule that ambiguity or obscurity in a written instrument may be removed by extrinsic evidence, from which he argues that since the evidence shows that the dwelling was located on the mid parcel the defect in the declaration is cured. The established rule is, however, that the right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence. (*Reed v. Englehart-Davidson Co.*, *supra*; *Boreham v. Byrne*, *supra*.)

In the light of the authorities above cited, the homestead in question must be held to be void, upon the ground that said declaration contained no statement that the declarant resided on the premises which he claimed as a homestead. That being so, the deed from David Olds to Thorington became an operative conveyance and vested title in Thorington, and the determination of the question of the defendants' prescriptive title becomes unnecessary.

Judgment reversed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 1, 1920.

All the Justices, except Olney, J., concurred.

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[Civ. No. 3352. First Appellate District, Division Two.—May 3, 1920.]

**ETHEL KEEPERS PATTERSON, Respondent, v. MONNIE BLACKBURN, Appellant.**

- [1] **PLEADING—FRAUD—UNVERIFIED ANSWER TO VERIFIED COMPLAINT—ADMISSIONS.**—In an action by a wife against her husband and another to recover certain real property which the defendant husband by fraudulent practices induced plaintiff to convey to him and which he in turn conveyed to his codefendant, who, it is alleged, was not a *bona fide* purchaser without notice, if the complaint is verified, an unverified answer by the defendant husband constitutes an admission on his part of the fraud practiced by him upon plaintiff.
- [2] **APPEAL—NOTICE OF—ERROR IN DATE—PARTY RESPONSIBLE—EFFECT OF.**—Where the prevailing party, in giving notice of decision and entry of judgment, makes an erroneous statement as to the date, and the adverse party, in giving notice of appeal, states that he appeals from a judgment entered on that date, the prevailing party will not be heard to urge that such notice of appeal is ineffectual.
- [3] **HUSBAND AND WIFE—CONFIDENTIAL RELATIONSHIP—BREACH OF—FRAUD.**—The least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the highly confidential relationship which it is the policy of the law to uphold, and is, therefore, fraudulent.
- [4] **ID.—KNOWLEDGE OF WRONGS OF HUSBAND—RELIANCE UPON PROMISES TO DO RIGHT—FOREGOING OF LEGAL REMEDIES—RATIFICATION OF FRAUD.**—Neither the fact that the wife, after knowledge of the fraud practiced upon her by her husband by reason of which she was induced to convey certain property to him, accepted his importunities to forego her legal remedies and quitclaimed the property to him, relying upon his renewed promises to sever his meretricious relations with another, which promises he did not keep, nor

the fact that in a subsequent action for divorce she failed to describe the property in question, constituted a ratification of the original fraud of the husband, as against his paramour who was a party to such fraud and to whom he had conveyed the property.

- [5] **ID.—ADVANCEMENTS BY PARAMOUR TO HUSBAND—DUTY OF WIFE TO REPAY—EQUITY.**—A court of equity, on determining that an unfaithful husband had defrauded his wife of her property and transferred it to his partner in the entire wrong is not required to compel the wife to adjust the money arrangements between those who wronged her as a condition of the return of her own property.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

A. L. Abrahams, P. B. D'Orr, Claude B. Morton and Frank G. Tyrrell for Appellant.

R. P. Jennings for Respondent.

**BRITTAIN, J.**—One of the defendants only appeals from the judgment, by which it was decreed that the plaintiff owned two pieces of property in Los Angeles, with a direction that conveyance should be executed by each of the two defendants of the properties to the plaintiff. Judgment followed the trial in which an advisory jury was impaneled to try the principal issues presented by the pleadings.

The plaintiff sued her husband and the appellant, alleging that she was the owner of the properties designated, respectively, "the apartment house" and "the bungalow" properties, which, by the fraudulent practices of her husband, she had been induced to convey to him and which he in turn conveyed to the appellant, who, it was alleged, was not a *bona fide* purchaser without notice. [1] The complaint was verified. The husband's answer was not verified, and, therefore, under the law, it constituted an admission on his part of the fraud practiced by him upon his wife. His co-defendant, the appellant, answered, setting up ownership of the properties in herself and denying substantially all the facts upon which the plaintiff relied for recovery. As to each of the properties specific interrogatories were submitted to the advisory jury, which returned a verdict in

favor of the plaintiff and determined, in the first instance as a matter of fact, that the appellant was not a *bona fide* purchaser for value. [2] On return of the verdict, on March 26, 1918, the clerk made a minute entry of what purported to be a judgment, such as would have been entered had the case been one at common law. This purported judgment was formally entered March 30, 1918. On March 28, 1918, judgment and decree was signed by the judge who presided at the trial, reciting that he adopted the findings of the jury. It was formally entered April 4, 1918. On April 5, 1918, the attorney for the plaintiff served upon the attorneys for the appellant a notice that "on March 30, 1918, the verdict of the jury and judgment thereon and judgment and decree in favor of the plaintiff was entered by the clerk of the court." Motion for new trial on the part of Monnie Blackburn was denied, and notice of appeal was filed. The notice of appeal, entitled in the cause, stated that Monnie Blackburn appealed "from the judgment heretofore entered herein on the thirtieth day of March, 1918, and the whole thereof."

On behalf of the respondent it is urged that because the first entry by the clerk was premature and without authority, the notice of appeal was ineffectual. (*Vallejo & Northern R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238].) The clerk's minute entry of March 26th, entered on March 30th, was not a judgment. The only judgment was that rendered on March 28th and entered on April 4, 1918. The addition of the date in the notice of appeal in describing the only judgment in the case must be disregarded in view of the notice of entry of judgment served by the attorney for the respondent. A highly technical contention, based on an erroneous statement made in the first instance by counsel making the technical contention, should not be made the basis of a refusal to consider an appeal otherwise properly presented on the merits.

The plaintiff and her husband, at the time of the trial, had been married eighteen years. There was one child, a daughter aged four. They came to California from their former home in 1915. The plaintiff was a woman of considerable means with which she purchased property in southern California, including the two properties in suit, and, confiding in the rectitude of her husband, she caused the

deeds to be taken in his name. Some time in 1916 they became acquainted with the appellant and shortly thereafter a meretricious relationship arose between the husband and Monnie Blackburn. In the latter part of January, 1917, because of this condition of affairs, the plaintiff sued her husband to recover her separate property. Upon the promise that he would sever his relationship with the appellant and comport himself as he should as the husband of the plaintiff and the father of their child, he induced his wife to dismiss the suit, and to evidence his good faith he deeded to her all her property. Shortly thereafter he represented to her that he had severed his connection with the appellant, and promising her that he would have no more to do with the appellant, he importuned the plaintiff to place in his name some of her property, stating that he thought he was entitled to something and did not want to feel like a beggar. Relying upon his representations, which the plaintiff alleged were made without any intention on his part to fulfill them, she reconveyed to him the two parcels involved in this suit. The meretricious relationship between himself and Monnie Blackburn was either continued or immediately resumed. [3] Regardless of the admission of the husband of the allegations of fraud made by his wife, the least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the highly confidential relationship which it is the policy of the law to uphold, and is, therefore, fraudulent. (Civ. Code, secs. 2217, 2219; *White v. Warren*, 120 Cal. 327, [49 Pac. 129, 52 Pac. 723]; *Jones v. Jones*, 140 Cal. 587, [74 Pac. 143].)

[4] In April, 1917, the plaintiff again sued her husband for the recovery of the two properties, the complaint being based on a charge of his fraudulent misrepresentations. Again he represented that he had entirely given up Monnie Blackburn, and promised that if his wife would let the two properties remain in his name, he would have nothing more to do with the appellant, but would conduct himself as a husband and father should. Although she was advised by her attorney not to dismiss the action, because, as she said, she then "loved him and still loved him," she caused the suit to be dismissed and a few days later at his request she executed a quitclaim deed covering the same

two parcels of land to him. Prior to this time they had discussed the improvement of these two properties. It was understood between them that the property should be mortgaged for that purpose. He represented that he could not secure the mortgage without her joining, and, no doubt, for the same reason that operated upon her to convey the two properties to her husband, she executed to him a quitclaim deed. He was thereupon enabled to mortgage the two properties for the purpose they had agreed upon, and the improvements were made. There is no question presented as to the rights of the mortgagees. As between husband and wife the same confidential relationship existed, and his admission of all the facts alleged by the plaintiff carries with it the admission that every act done by him pursuant to the scheme of fraud was tainted by the original fraud. On behalf of the appellant, it is claimed that the quitclaim constituted a ratification on the part of the wife because it was made by her after her knowledge that the husband had not in fact performed his promise made at the time of the original deeds to sever his immoral and unlawful relationship with the appellant. If there is evidence to support the finding of the jury adopted by the court that the appellant was fully informed in regard to all the facts, she is bound by the same rule of law which binds the husband.

About November 1, 1917, the plaintiff sued her husband for divorce. In her complaint she described the properties standing in her own name and did not describe the properties involved in this action. It is claimed that this also amounted to a ratification of the deed fraudulently procured from her by her husband. As against a party to the fraud this was not a ratification, and while an argument is made in the appellant's opening brief on the ground of estoppel, counsel for the appellant abandoned that ground in their closing brief, and it need not be considered. During Christmas week of 1917, the plaintiff and her husband had a conversation in which she told him that if she thought he was going to lose the properties, she would step in and save them, presumably by buying the encumbrances, because he had promised that their child should have the property and that he would make a will in favor of the child. He then told her he would do everything he could to make the property a success and that their child was to get it. Almost



coincidentally with this conversation the two defendants went to Venice, near Los Angeles, and took up their residence in an apartment house, where the husband adopted an assumed name and the appellant passed as his wife. On January 4, 1918, they were arrested, and the husband was confined in the city jail in Venice. On January 7, 1918, while he was still in jail the husband executed a deed of the apartment house property to the appellant. The present suit was commenced on January 9, 1918, and *lis pendens* was filed. On January 10, 1918, the husband conveyed to the appellant the bungalow property. At the time of the transfer of the properties the apartment house was encumbered by a first mortgage of over \$17,000, a second deed of trust of nearly \$4,000, with interest and lienable claims for materials of about \$1,100, and the bungalow property was encumbered by a first mortgage for \$2,400 and other indebtedness of \$240. The appellant claims that she had advanced the husband certain small sums of money, that she had actually paid to him ten dollars at the time of the transfer of the apartment house property, and as a further consideration she undertook to procure bail to have him released from the jail. It is practically conceded that she had actual, as well as constructive, notice of the claims of the plaintiff before the execution of the deed of the bungalow property, and the evidence is conflicting as to her knowledge of the various transactions which have been recited. It is claimed by the appellant that there is no evidence of her knowledge, but there is sufficient evidence of facts to warrant the deduction drawn by the jury and adopted by the trial court that the appellant was very fully informed in regard to the dealings between the plaintiff and her husband.

From the frank, if not bold, statement of facts contained in the appellant's brief, which for the most part furnishes the basis for the recitals made above, it clearly appears that the fraud of the husband was the cause of the original deeds being made to him. When he repeatedly importuned his wife to forego her legal remedies and made renewed promises, which he as repeatedly violated, it would amount to a judicial sanction of gross fraud on the part of the husband to hold that because his wife loved and trusted him more than he deserved to be trusted, she should be held to have ratified his wrong when in his final disregard of every

rule of honorable living he so publicly comported himself with the beneficiary of his fraud as to bring about the arrest of himself and his paramour and his own incarceration.

[5] It is contended on behalf of the appellant that the plaintiff did not offer to do equity in her complaint, and the court should at least have required the plaintiff to pay to the appellant the moneys which the appellant advanced to the plaintiff's husband. In other words, that a court of equity, determining on the admission of an unfaithful husband that he had defrauded his wife of her property and had transferred it to his partner in the entire wrong, should, as a condition for the return of her own property to the wife, compel her to adjust the money arrangements between those who had wronged her. This court knows of no rule of equity which requires any such adjudication.

Upon an examination of the entire record, this court is of the opinion that there was no reversible error committed by the trial court, and that there was sufficient evidence to support the judgment. There was no miscarriage of justice within the meaning of section 41½ of article VI of the constitution.

The judgment is affirmed.

Langdon, P. J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 1, 1920.

All the Justices concurred.

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[Crim. No. 911. First Appellate District, Division Two.—May 5, 1920.]

In the Matter of the Application of RUSSELL SANDERS  
for a Writ of Habeas Corpus.

- [1] CRIMINAL LAW—VIOLATION OF PAROLE—FORFEITURE OF CREDITS—POWERS OF PRISON DIRECTORS.—Where a prisoner, while on parole, commits a second crime, the state board of prison directors has the power to forfeit not only his credits for good conduct which have already been earned on his first sentence but also such credits as might thereafter be earned by him on said sentence.

APPLICATION for a Writ of Habeas Corpus to secure the release of a prisoner held in the state penitentiary. Writ denied.

The facts are stated in the opinion of the court.

Russell Sanders, *in pro. per.*, for Petitioner.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

LANGDON, P. J.—The petitioner applied for a writ of *habeas corpus*, alleging that he was illegally restrained of his liberty by the warden of the state penitentiary. Upon the hearing, it appeared that the petitioner, as prisoner No. 30164, was received at San Quentin prison, December 21, 1916, from Los Angeles County, for the crime of forgery, under sentence to serve a term of four years and six months. On this term he was allowed the credits provided for under section 1588 of the Penal Code, and the allowance of said credits reduced the term to a net sentence of three years, three months, and fifteen days, entitling him to discharge under that judgment and commitment on April 6, 1920. On that date, April 6, 1920, he was discharged as convict No. 30164, but has since been held in prison by virtue of another judgment and commitment under which he was received in prison on April 6, 1913, as prisoner No. 26423 from the county of Santa Barbara, for the crime of forgery under the sentence of eight years. The sentence imposed in Los Angeles County in 1916 was imposed to run concurrently with the first term, and was imposed while the petitioner was on parole.

On June 30, 1916, the petitioner, while serving the eight-year sentence, was released on parole. On December 16, 1916, the state board of prison directors ordered the parole of the petitioner revoked. Thereafter, he was carried as a parole violator until he was returned to the prison on December 21, 1916, at which time he was received, as before stated, from Los Angeles County on a judgment of conviction of a similar crime.

On January 27, 1917, the board of prison directors heard charges preferred by the state parole officer, charging the

petitioner with a violation of his parole. The prisoner was called before the board and the charge explained to him and he admitted it to be true. The board of prison directors thereupon adopted a resolution ordering forfeiture of all credits earned or to be earned by petitioner on the sentence he was serving when he was paroled, as a result of which order, petitioner is required to serve the eight-year sentence which he began serving on April 6, 1913. This eight-year term, with the five days lost from December 16, 1916, the day his parole was revoked, until December 21, 1916, the day he was returned to prison, requires his being held in custody until April 11, 1921.

[1] The petitioner's position is that the board of prison directors had no power to forfeit his credits for good conduct which had already been earned on his first sentence and which would thereafter be earned by him on said sentence, because of the commission of the second crime while upon parole. While the petitioner was on parole, he was constructively a prisoner; he had the civil status of a prisoner. Section 1588 of the Penal Code provides that "every convict who shall have no infraction of the rules and regulations of the prison, *or the laws of the state* recorded against him . . . shall be allowed from his term" certain credits. Said section also provides that "each convict shall be entitled to these deductions, unless the board of directors shall find that for misconduct or other cause he should not receive them." The section also provides that "if any prisoner in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that under this section he may earn in the future, or shall forfeit such part of such deductions as to the board of directors may seem just." The "ticket-of-leave" under which the prisoner was released from the prison set forth the conditions which must be observed by the parole prisoner under penalty of being returned to prison. These conditions include, of course, an observance of all the laws of the state. The prisoner violated a condition of his parole, and in doing so he violated a prison regulation. Having violated a law of the state during the period of his sentence, he forfeited his right to the credits for good conduct.

The minutes of the board of prison directors show that the petitioner was brought before the board and the charge of forgery explained to him, which he admitted; whereupon, by resolution of said board, his credits, past and future, were forfeited. Petitioner urges that he was not charged with evil intent. The crime itself implies an evil intent; the two are inseparable.

The petitioner argues that as a matter of public policy, section 1588 of the Penal Code should be so construed as to give to the board of directors no power to forfeit credits which might be earned in the future, as such a procedure leaves a prisoner without hope and without incentive to good conduct. This is indeed unfortunate; but there are numerous considerations of public policy connected with the question—one of the most important being that paroled prisoners shall not violate their paroles. For the purpose of accomplishing this result, it is desirable that the board have power to inflict such penalties as will act as a deterrent. There is no doubt that under the powers given the board by section 1588 of the Penal Code, if petitioner had broken a law of the state while actually confined in the penitentiary, the board would have had the power to forfeit his credits, past and future, upon the term he was then serving. He cannot be in a better position by reason of the fact that at the time of his offense he was being extended special privileges by the board under its power to parole prisoners. The writ is denied and the prisoner is remanded to the custody of the warden of the state penitentiary.

Brittain, J., and Nourse, J., concurred.

[Civ. No. 3093. Second Appellate District, Division One.—May 5, 1920.]

J. C. WILKINSON, Respondent, v. RALPH G. ROHRER  
et al., Appellants.

[1] NEGLIGENCE — AUTOMOBILE COLLISION — VIOLATION OF MOTOR VEHICLE ACT—EFFICIENT CAUSE OF ACCIDENT.—In an action to recover compensation for damage to plaintiff's automobile as the result of a collision between it and that of defendants, the act of the plaintiff in "cutting the corner" in turning into an intersecting street, in violation of the provisions of the Motor Vehicle Act, will not bar his recovery, unless it is made to appear that such negligence was a part of the efficient cause of the collision.

APPEAL from a judgment of the Superior Court of San Diego County. E. A. Luce, Judge. Affirmed.

The facts are stated in the opinion of the court.

Shreve & Shreve and Ralph F. Twombly for Appellants.

Heskett & Sample for Respondent.

SHAW, J.—In a collision between the automobile of plaintiff and that of defendants, the car of the former was damaged, for the recovery of which he brought this action and obtained a judgment for \$299, from which defendants have appealed.

Among other defenses interposed by defendants was that of contributory negligence of plaintiff, as to which the court made an adverse finding, and the sole ground here urged for a reversal is that this finding is not supported by the evidence.

[1] It appears from the evidence that plaintiff was driving his car east on Bush Street, in the city of San Diego, and, upon arriving at the intersection of Goldfinch Street, which runs north and south, he turned into the same, going north. In making the turn he, instead of going to the right of the center of the intersection of the two streets, as re-

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1. Cutting of corners by automobile, as negligence, note, 6 A. L. R. 321.

quired by the Motor Vehicle Act, entered Goldfinch Street passing to the left of said center, thus "cutting the corner." At the same time defendants were, on Goldfinch Street, approaching from the north, driving their car southerly on the left-hand side of the street at a speed of some forty miles per hour, all in violation of the provisions of the Motor Vehicle Act. The collision of the two cars occurred at a point in Goldfinch Street about twenty feet north of the north line of Bush Street and on the east side of the center of Goldfinch Street.

That plaintiff was guilty of negligence by reason of the line of travel followed in turning from Bush Street into Goldfinch Street may be admitted. But such fact will not bar his recovery, unless it be made to appear that such negligence was a part of the efficient cause of the collision; that is, there must have been a causal connection between his negligence in so doing and the injury complained of. At the time when the collision occurred, as shown by the record, plaintiff was driving his car upon the right-hand side of the center of the street, where he was entitled to travel, and the fact that in reaching such position he had negligently cut across the corner of the intersecting street was not a contributing cause of the collision, but, as appears from the evidence, wholly disconnected therefrom. Clearly, he was where he had a right to be and where, but for the fact that defendants were on the wrong side of the street and traveling at an unlawful rate of speed, the collision would not have occurred.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 705. Second Appellate District, Division One.—May 5, 1920.]

THE PEOPLE, Respondent, v. A. R. MAJORS, Appellant.

- [1] **CRIMINAL LAW—BURGLARY—POSSESSION AND SALE OF STOLEN PROPERTY—EVIDENCE OF GUILT.**—Although the mere possession, by a defendant charged with the commission of the crime of burglary, of the stolen property after the time of the burglary may not be sufficient to warrant his conviction, such possession, taken together with his sale of the property, under a false name and for a grossly inadequate price, in the absence of any explanation, are circumstances sufficient to sustain a verdict of conviction.
- [2] **ID.—USE OF MEMORANDUM TO REFRESH MEMORY—CONVERSATIONS WITH THIRD PERSON IN DEFENDANT'S PRESENCE—ADMISSIBLE EVIDENCE.**—In this prosecution of a defendant charged with the commission of the crime of burglary, the court did not err in permitting a witness for the prosecution, to whom the defendant had sold a part of the stolen goods, to refresh his memory as to dates and other details from a memorandum made by him at or about the time when the transaction occurred, or in permitting such witness to testify as to conversations and transactions between him and a third person, in the presence of the defendant, relating to the purchase by him from such third person of certain articles, some of which were a part of the loot of the burglary for the commission of which defendant was on trial.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Frank R. Willis, Judge. Affirmed.

The facts are stated in the opinion of the court.

Paul W. Schenck and Richard Kittrelle for Appellant.

U. S. Webb, Attorney-General, Arthur Keetch, Deputy Attorney-General, and Thomas A. Wood for Respondent.

**CONREY, P. J.**—The defendant having been convicted of the crime of burglary, appeals from the judgment, and from the order denying his motion for a new trial.

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1. Possession of stolen property as evidence of burglary, note, 19 Ann. Cas. 1281.

2. Recollection of past transactions as aided by written memoranda, notes, 98 Am. Dec. 619; 35 Am. Rep. 56; 8 Ann. Cas. 210.



[1] Appellant contends that the evidence is insufficient to sustain the verdict in this, that there is no evidence that the defendant committed the crime. That burglary was committed at the time and place alleged, in the house of one George B. Varnum, is not now disputed. One of the articles stolen on that occasion was a pair of binocular glasses. The burglary occurred on the eleventh day of February, 1919. One Levy, a jeweler, testified that on the twenty-seventh day of February, 1919, he bought those glasses from the defendant, who then and there signed the name B. F. Strong on a memorandum of the sale, in a book kept by Levy. The witness Murphy, one of the officers who arrested defendant, testified that when arrested, the defendant said that his name was James Wilson. A handwriting expert, whose testimony remains uncontradicted, testified that the signature B. F. Strong, on Levy's book, was written by the same person who signed another document, whereon it was shown that the defendant had signed the name James Wilson. The sale made by defendant to Levy, of the binocular glasses and other jewelry brought defendant only ten dollars for the lot. The glasses alone were worth sixty dollars. Conceding that mere possession by defendant of the stolen property after the time of the burglary would not be sufficient to warrant his conviction, it seems clear that such possession, taken together with his sale of the property, under a false name and for a grossly inadequate price, in the absence of any explanation,—and none appears,—are circumstances quite sufficient to sustain the verdict. (*People v. Lang*, 142 Cal. 482, [76 Pac. 232].)

[2] It is contended that the trial court erred in permitting the witness Levy to testify from a private record kept by that witness, without first compelling the prosecution to lay the proper foundation, and in permitting the prosecution to prove by the same witness certain conversations had with and purchases made from one Soulard on February 26th, in the presence of the defendant. The memorandum from which Levy testified was shown to have been made by him at about the same time when the transactions occurred. He testified principally from memory, but used the memorandum to refresh his memory concerning dates and perhaps as to some other details. We think that the court did not err either in this matter or in allowing the testimony as to con-

versations and transactions between Levy and Soulard in the presence of the defendant. The sales made by the defendant to Levy on the twenty-seventh day of February occurred in the presence of Soulard. On the preceding day these two men had made the first of their two joint visits to Levy, and on this first occasion certain articles of jewelry were sold to Levy by Soulard in the presence of the defendant. Some of the articles sold by Soulard were a part of the loot which had been taken from the Varnum house on February 11th.

The remaining matters complained of by appellant are that the court erred in refusing to allow the defendant to examine the witness Levy concerning a visit made by the defendant to Levy's place of business after the defendant had been charged with this crime; and in permitting the witness Wood to testify concerning the result of certain investigations made by him as to where the defendant lived. In view of the conclusion at which we have arrived concerning the matters previously discussed, it is unnecessary to enter further into the record concerning these two last assignments of error. They are not of sufficient weight and importance to affect the result of the case, or to enable us to say that there has been any miscarriage of justice.

The judgment and order are affirmed.

Shaw, J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 1, 1920, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 1, 1920.

All the Justices concurred.

[Civ. No. 3312. First Appellate District, Division One.—May 6, 1920.]

AGNES WILLIAMSON, Respondent, v. CHARLES S. HARDY, Appellant.

- [1] JURIES AND JURORS—INTEREST OF JURORS IN SURETY COMPANY—PROPER EXAMINATION.—Upon their *voir dire* it is not error to ask the jurors as a body whether or not they are the owners of stock in a given surety company.
- [2] NEGLIGENCE—ACTION FOR DAMAGES—MISCONDUCT OF PLAINTIFF'S COUNSEL—RECORD.—On this appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries, the record did not support the contention of appellant that counsel for plaintiff were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of appellant against claims for damages, the only time counsel for plaintiff referred to that fact the court having instructed the jury to disregard the remarks of counsel for plaintiff in that respect.
- [3] ID.—PERSONAL OBSERVATION OF PLAINTIFF FOLLOWING ACCIDENT—EVIDENCE.—In this action for damages for personal injuries sustained by plaintiff through having slipped and fallen upon the floor of the defendant's meat market, the court properly permitted witnesses who were called by the plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and half or so thereafter.
- [4] ID.—CAUSE OF ACCIDENT—TESTIMONY OF PLAINTIFF—PROPER SUBMISSION TO JURY.—In such action, the plaintiff having testified positively that she slipped and fell upon the floor of the defendant's meat market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, it was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont and were required to walk while making their purchases therein, and the court properly denied the defendant's request for a directed verdict.

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1. Connection with casualty or indemnity company as disqualification of a juror in an action against one insured or indemnified by such company, note, L. R. A. 1915A, 153.

APPEAL from a judgment of the Superior Court of San Diego County. Franklin J. Cole, Judge presiding. Affirmed.

The facts are stated in the opinion of the court.

Duke Stone and Eugene Daney for Appellant.

Crouch & Chambers for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of the plaintiff for damages arising out of injuries sustained by her through having slipped and fallen upon the floor of the defendant's meat market in the city of San Diego, her said fall having been occasioned, according to plaintiff's averments, by the slippery and unsafe condition of said floor.

The case was tried before a jury, and the first contention of the appellant is that during the proceedings for obtaining the jury, and also upon several occasions during the trial of the cause, counsel for plaintiff were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of the defendant against claims for damages. As to the alleged misconduct of counsel for the plaintiff during the process of procuring the jury it is conceded by counsel for the appellant that it is not error to inquire of the jurors if they are stockholders or interested in a certain surety company. [1] It would seem, therefore, that the question which was put to the jurors as a body to the point whether or not they were "the owners of stock in the Western Indemnity Company, a corporation," by counsel for the plaintiff, cannot, standing alone, be held to furnish a basis for the appellant's claim. [2] But the appellant insists that upon several occasions during the trial counsel for plaintiff persisted in making statements in the presence of the jury regarding the surety company in question which, taken in connection with the question asked upon their *voir dire* examination, showed a persistent intent to impress the jury with the fact that the action was being defended by said surety company. Upon an examination of the record in this regard we fail to find a sufficient basis for this claim. It is true that at one time during the trial

some question arose with regard to the production of certain X-ray photographs which were in the possession of the physician of the surety company, and this led counsel for the plaintiff to refer to that fact; but we find in that connection that the court instructed the jury to disregard the remarks of counsel for plaintiff in that respect, and we can find no reason in the record for assuming that the jury disregarded that instruction. Nor do we feel that plaintiff's counsel were so far guilty of willful misconduct in connection with that episode as to justify a reversal of the case.

[3] The appellant's second contention is that the trial court committed error in permitting several witnesses who were called by the plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and a half or so thereafter. An inspection of the record discloses that these several witnesses merely testified to matters of personal observation, and did not undertake to testify as to any conclusions drawn by them therefrom as to the seriousness of her preceding injuries. It requires no citation of authority to sustain the view that evidence of this kind is admissible, and that objections thereto go not to the admissibility of such evidence but as to its weight; and as to the weight of such evidence the jury was the sole judge.

[4] The appellant's third contention is that upon all of the evidence in the case the court should have granted the defendant's request for a directed verdict. There is no merit in this contention. Taking the plaintiff's positive testimony that she slipped and fell upon the floor of the defendant's market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, it was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont and were required to walk while making their purchases therein.

Finally, the appellant objects to the alleged error of the court in the giving and refusal of certain instructions. The defendant's requested instructions which the court refused to give were those which would have required the jury to bring a directed verdict in the defendant's favor, and as to these, as already stated, there was no error. As to the in-

structions which the court gave upon the general phases of the case we find that upon the whole they are quite full and fair, and are not subject to the criticism which the appellant aims at particular and isolated portions of said instructions, and hence that appellant's final contention in this regard is without merit.

No errors appearing in the record, the judgment is affirmed.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

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[Civ. No. 3293. First Appellate District, Division Two.—May 6, 1920.]

MARY JUDNICK, Respondent, v. ANTONE JUDNICK et al., Appellants.

- [1] JUDGMENTS—SALE ON EXECUTION—SATISFACTION BY PURCHASER—ORDER VACATING—APPEAL.—A judgment in this state cannot be sold under execution; and an appeal will not lie from an order of the superior court vacating a satisfaction of judgment entered by the clerk, based upon a satisfaction of judgment executed by the purchaser of the judgment at an execution sale.
- [2] ID.—SURETIES ON STAY BOND—JUDGMENT AGAINST BY CONSENT—RIGHT OF ORIGINAL JUDGMENT DEBTORS TO APPEAL.—Where the judgment entered against the sureties on a stay bond is in effect a consent judgment and, therefore, unappealable by the sureties, the original judgment debtors cannot appeal from that judgment upon the theory that they are privies of the bondsmen.

MOTIONS to dismiss an appeal from an order of the superior court of the City and County of San Francisco vacating a satisfaction of judgment and an appeal from a judgment by said court against the sureties on a stay bond. E. P. Shortall, Judge. Appeals dismissed.

The facts are stated in the opinion of the court.

Walter J. Thompson and J. E. Manning for Appellants.

Daniel O'Connell for Respondent.

BRITTAI, J.—Motions to dismiss two appeals. On December 6, 1918, judgment was entered in the superior court in favor of the plaintiff and against Judnick Bros., a co-partnership, and Steve Judnick, for the sum of \$900, interest and costs. Thereafter Antone Judnick, one of the firm of Judnick Bros., appealed from the judgment. Upon motion made on behalf of the plaintiff and respondent, the appeal from the judgment was dismissed by an order of this court on August 13, 1919, on which *remittitur* was filed in the superior court on October 14, 1919.

One of the defendants, Steve Judnick, on February 26, 1919, paid to the plaintiff \$346 for release of one-third of the judgment. While the matter was pending in this court on appeal from the judgment the defendants, or some of them, caused to be entered on the register of actions in the superior court under dates of July 24th and 28th, a statement that a certificate of sale had been filed, satisfaction of judgment filed, judgment satisfied and docket discharged. These entries were based upon the satisfaction of judgment executed by one Meurice Swim, described as "purchaser at sheriff's sale of judgment." The satisfaction recited that it was by "the undersigned purchaser of said judgment in the above-entitled action at an execution sale of said judgment had upon execution issued out of the Superior Court in the State of California, in and for the City and County of San Francisco, in that certain action wherein Antone J. Judnick was plaintiff, and the said Mary Judnick and Frank Judnick were defendants, and which said judgment was rendered and entered on the 21st day of September, 1918, and which said action lastly hereinbefore referred to was and is known as and numbered 67350 in the records of said Superior Court." It appears that Frank Judnick was also one of the firm of Judnick Bros. The action in which the present appeals were taken was numbered 88965 of the records of the superior court. Judgment in favor of Antone Judnick and against Mary Judnick was for sixteen dollars, and the sale of the judgment involved in these appeals was made for the sum of twenty dollars.

On December 23, 1919, on motion the superior court made an order vacating and setting aside the entries made by the clerk relating to the satisfaction of the judgment, and one of the two appeals is from that order. On January 6, 1920,

judgment was entered against Frank O'Shea and Irvine O'Shea, sureties on a stay bond of April 17, 1918, staying execution on the original judgment.

While the record on these motions is not entirely clear, in opposition to the notice of motion an affidavit was filed by one of the attorneys for the defendants and appellants controverting immaterial matters stated in the affidavit in support of the motions, and no suggestion was made either in the affidavit or in any other way that the record on the motion was defective. On the oral argument counsel for both parties and the court proceeded on the statement that the defendants in the original action were the only appellants.

[1] In regard to the appeal from the order vacating the satisfaction of judgment entered by the clerk, since the only right claimed was by a purchaser of the judgment at execution sale thereof, and this fact appears from the face of the record, the conclusion is reached that the order was not appealable for the reason that a judgment in this state cannot be sold under execution. (*Latham v. Blake*, 77 Cal. 646, [18 Pac. 150, 20 Pac. 417]; *Carpenter v. Lewis*, 119 Cal. 18, [50 Pac. 925].) The purchaser at the execution sale is not one of those authorized to satisfy the judgment of record, and this court has no jurisdiction of an appeal from the order vacating the entry of satisfaction.

[2] The motion to dismiss the appeal of the defendants to the original suit from the judgment entered against the sureties on the stay bond must also be granted. They were not parties to that judgment, nor aggrieved thereby, and neither Frank O'Shea nor Irvine O'Shea, against whom alone the judgment was entered, appeal. The judgment against the sureties was in effect a consent judgment and was, therefore, unappealable by the sureties. (*Erlanger v. Southern Pac. Co.*, 109 Cal. 395, [42 Pac. 31]; *Oullahan v. Morrissey*, 73 Cal. 297, [14 Pac. 864]; *La Societe etc. v. Beardslee*, 63 Cal. 160.) Since the persons against whom the judgment on the bond runs could not appeal, the original judgment debtors could not appeal from that judgment upon the theory that they were privies of the bondsmen.

Both appeals are dismissed.

Nourse, J., and Cabaniss, P. J., *pro tem.*, concurred.



[Civ. No. 2833. Second Appellate District, Division One.—May 6, 1920.]

**MORTGAGE SECURITIES COMPANY OF CALIFORNIA** (a Corporation), Appellant, v. **F. W. PFAFFMAN**, Respondent.

- [1] **CLAIM AND DELIVERY—DELIVERY OF AUTOMOBILE TO PLAINTIFF FOLLOWING JUDGMENT—REVERSAL ON APPEAL—RIGHT TO RESTITUTION.** In an action by a mortgagee against a repairman to recover possession of an automobile, the mere delivery of the automobile by the defendant to the plaintiff, for whom judgment was rendered, pending the determination of defendant's appeal, no stay bond being filed, will not deprive the defendant of the right to have a judgment of restitution of the property upon a retrial of the cause, following the reversal by the appellate court of the first judgment entered.
- [2] **ID.—JUDGMENT FOR PLAINTIFF—DUTY OF PLAINTIFF TO DELIVER POSSESSION ON DEMAND.**—The trial court, in such action, having adjudged that plaintiff was entitled to the possession of the automobile, the law imposed the duty upon the defendant, where execution was not stayed, to deliver the machine to plaintiff upon its demand, even though execution was not issued upon the judgment.
- [3] **ID.—PRIORITY OF LIEN OF REPAIRMAN—NONPAYMENT OF MORTGAGE DEBT—IMMATERIAL ISSUE.**—In an action by a mortgagee against a repairman to recover possession of an automobile, the trial court having determined, in accordance with a decision by the supreme court on an appeal from a prior judgment in the case, that the lien of the repairman is superior to the lien of the mortgagee, its failure to find on the issue as to the nonpayment of the mortgage debt is immaterial.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Tobias R. Archer for Appellant.

Duke Stone for Respondent.

**JAMES, J.**—Appeal from a judgment entered in favor of the defendant.

The action was brought by the plaintiff to obtain possession of a certain automobile. In the original complaint filed it was alleged that the plaintiff acquired a lien upon the automobile by reason of a certain chattel mortgage executed by the Chatts; that the mortgage provided that in the event the mortgagors failed to pay the amount of the mortgage debt, plaintiff might take possession of the automobile and proceed to sell the same in the manner provided by law; further, that at the time suit was brought the said debt had matured and remained unpaid. Defendant answered and asserted, in brief, that the automobile had been delivered into his possession by the Chatts and that, at the request of the latter, repairs had been made upon the machine aggregating in value the sum of \$349.40, of which sum nothing had been paid but ten dollars, and that the defendant claimed right to the possession and the lien given him by section 3051 of the Civil Code. The cause was tried and the court determined that the lien of the chattel mortgage was superior to the lien of the repairman, and gave judgment to the plaintiff for recovery of the automobile. An appeal was taken to this court, where the judgment was affirmed. A rehearing was granted by the supreme court and a reversal of the judgment entered by the trial court was ordered, it being last determined that the lien of a repairman is superior to that of a mortgagee. (*Mortgage Securities Co. v. Pfaffman*, 177 Cal. 109, [L. R. A. 1918D, 118, 169 Pac. 1033].) Before the second trial was had, which resulted in the judgment here appealed from, plaintiff filed a supplemental complaint alleging, in effect, that subsequent to the first trial the controversy had been settled by the voluntary delivery of the automobile by the defendant to the plaintiff; further, that after obtaining such possession the plaintiff had proceeded to sell the machine after the giving of the usual notices. An answer was filed to this supplemental complaint, which raised an issue as to the settlement having been made of the controversy. The second trial was proceeded with, evidence heard, findings made, and judgment entered. As to the matter concerning the delivery of the automobile by the defendant to the plaintiff, the court determined the facts as follows: "That at the institution of this suit the defendant refused to deliver to the plaintiff the said automobile, claiming his right to retain

the same under section 3051 of the Civil Code of the state of California; and that the above cause first came on for trial in the month of February, 1917, resulting in a judgment for plaintiff, from which an appeal was taken by the defendant to the supreme court of the state of California, which afterward reversed said decision, and that pending said appeal, to wit, on or about June 29, 1917, the defendant delivered to the plaintiff the said automobile after demand had been made therefor by the plaintiff under its judgment rendered in said cause tried in February, 1917, and in pursuance of said demand, the defendant delivered said automobile to the plaintiff, and that no bond was made pending the appeal of said action, but that no consideration or nothing of value whatever was paid or agreed to be paid to the defendant for the delivery of said automobile to the plaintiff, and the said delivery was made in pursuance of the demand by the plaintiff by its duly authorized officer; and that the value of said automobile is the sum of \$595. That defendant from the institution of said action up until said June 29, 1917, continued in possession of said automobile, and it is not true that the defendant at any time, as alleged in the complaint, wrongfully or unlawfully detained said automobile, and it is not true that the plaintiff was entitled to the possession thereof." The conclusions of law embrace the statement that "defendant did not waive his rights herein by the delivery of said automobile to the plaintiff or its agent."

[1] The chief contention made by appellant is that the findings of the court against the allegations of the supplemental complaint are not sustained by the evidence; that is, that the evidence showed a voluntary delivery of the automobile by the defendant to the plaintiff, with intent to satisfy the judgment first rendered by the court and to make a settlement of the controversy. That the mere delivery of the automobile to the plaintiff pending the appeal did not deprive the defendant of the right to have a judgment for restitution of the property upon retrial, seems very clear. No stay bond was given, and the plaintiff without doubt had the right, pending an appeal under such circumstances, to require the property to be delivered to it in compliance with the terms of the judgment. [2] The fact that no order or execution was issued upon the judgment does not

change the situation, for the law imposed the duty upon the defendant, where execution was not stayed, to deliver the machine to plaintiff upon its demand. In the case of *Warner Bros. Co. v. Freud*, 131 Cal. 639, [82 Am. St. Rep. 400, 63 Pac. 1017], that question is considered and the court quotes with approval from Freeman on Judgments, section 480a, as follows: "One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is, that though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal." The assertion of appellant that the evidence showed that the automobile was delivered by the defendant to it with the full intent to satisfy the judgment and settle the controversy is borne out only by the evidence offered on behalf of the plaintiff. There was other evidence to the contrary submitted by the defendant and a conflict resulted, which, of course, was for the trial court to settle. The testimony of defendant's witnesses on this point, if credited by the trial judge, as we must assume it was, is amply sufficient to sustain the findings adverted to.

[3] A second point made by the appellant is that the court failed to find upon a material issue tendered by the pleadings, to wit, as to the nonpayment of the mortgage debt. It is true that the findings do not cover that matter, but in view of the fact that the trial court properly determined, under the decision of the supreme court in the case, the lien of a materialman to be superior to that of a mortgagee, such finding, if made, would not have indicated any different judgment than that entered. The omission, therefore, must be considered here as an immaterial one. There is evidence shown in the record establishing the value of the automobile and the amount of the lien charges held by the defendant against it.

We find no error justifying the claim for reversal.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 1, 1920.

All the Justices concurred.

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[Civ. No. 3251. Second Appellate District, Division One.—May 6, 1920.]

**CONTINENTAL CASUALTY COMPANY** (a Corporation), Petitioner, v. **INDUSTRIAL ACCIDENT COMMISSION** et al., Respondents.

[1] **WORKMEN'S COMPENSATION ACT—INJURY TO EMPLOYEE WHILE ON VACATION—SCOPE OF EMPLOYMENT.**—Under the Workmen's Compensation Act, an injury sustained by an employee when, upon his own time, free from any duties to his employer, he is engaged in the diversions of his vacation, is not an injury arising out of and in the course of his employment, notwithstanding at the time of the injury he is returning from a railway station, at which place among the things done, he mailed a letter in answer to one he received from his employer on a matter connected with the business of the latter.

**PROCEEDING** in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Joe Crider, Jr., for Petitioner.

A. E. Graupner for Respondents.

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1. Injuries "arising out of and in the course of employment" within meaning of Workmen's Compensation Act, notes, *Ann. Cas.* 1913C, 4; *Ann. Cas.* 1914B, 498; *Ann. Cas.* 1915A, 126; *Ann. Cas.* 1915C, 779; *Ann. Cas.* 1916A, 388; *Ann. Cas.* 1916B, 1293; *Ann. Cas.* 1916D, 584, 694; *Ann. Cas.* 1916E, 166; *Ann. Cas.* 1917D, 195, 199, 209; *Ann. Cas.* 1917E, 321, 332; *Ann. Cas.* 1918D, 683; *Ann. Cas.* 1918E, 813, 1168; *L. R. A.* 1916A, 40, 232; *L. R. A.* 1917D, 114; *L. R. A.* 1918F, 896.

SHAW, J.—In this proceeding upon a writ of review we are asked to annul an award of compensation made by the Industrial Accident Commission to Grey M. Skidmore for injuries alleged to have been sustained while employed as sales manager by the Golden State Portland Cement Company, of which company petitioner was the insurer.

[1] Petitioner attacks the award upon the ground that the evidence is insufficient to sustain the finding of the commission that the injury to Skidmore as such employee arose out of and in the course of his employment.

In September, 1918, Skidmore, accompanied by his family, went from his home in Los Angeles County to a mountain ranch of a relative in northern California, located some five miles from a railway station and postoffice, known as Island Mountain, to spend a week or more in hunting, horseback riding and like diversion, as a vacation. He arrived at the ranch on September 25th, and on the two following days, free from any duties to his employer, engaged with marked success in hunting deer and other game abounding in the vicinity. On September 26th he received a letter from his employer, dated September 23d, pertaining to a request made by a customer for an adjustment of freight upon a bill of goods sold him and which it was claimed Skidmore had agreed to grant, as to which Skidmore made reply the same day; but having learned that some mail, among which was his questionnaire, awaited him at Island Mountain, he held this letter unsealed and, on the morning of September 27th, took his rifle and, by horseback, following a trail representing a shorter route to the station and along which game was plentiful, went to Island Mountain, to which place his wife, accompanied by his uncle, proceeded in a vehicle over the road. Upon arriving at the station he received another letter from his employer, dated September 26th, containing information of general interest as to the progress of the business, but nothing calling for answer, though at the station, in finishing his letter in reply to that of September 23d, he made such comments and suggestions as might be expected from a sales manager on his vacation, referred to his success in hunting, and ended his letter by saying, "Am riding down to the station horseback five miles to fix up my questionnaire." After answering the questionnaire, he assisted his uncle in loading some grain and

then went to his horse, which he mounted to return to the ranch, when he was thrown therefrom and his leg broken.

It thus appears that the accident occurred at a time when Skidmore was relieved from duty as an employee of the Golden State Portland Cement Company and while he was engaged in the diversions incidental to the vacation granted him, among which was horseback riding and hunting. His time was his own, to use as he pleased. His purpose in going to the station, as stated by him in his letter, was to answer his questionnaire. For his own diversion he went horseback and, since deer were plentiful along the trail, he took his rifle. The mailing of the letter to his employer was a mere incident of the trip; but conceding the writing and mailing of the letter was within the scope of his employment, he was not injured while engaged in such act, but afterward and when, upon his own time, free from any duties to his employer, he had engaged in the diversions of his vacation. (*Gernhardt et al. v. Industrial Acc. Com.*, 43 Cal. App. 484, [185 Pac. 307].) He is no more entitled under the law to claim compensation from his employer for the injury which happened to him in thus returning to the ranch than he would have been had it occurred while he was traveling from his home in Los Angeles to the place where his vacation was to be spent. "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment." (*Coronado Beach Co. v. Pillsbury et al.*, 172 Cal. 682, [L. R. A. 1916F, 1164, 158 Pac. 212].) There was nothing in the nature of Skidmore's duties to his employer which required him to ride horseback over this trail, carrying a rifle, in traveling from the station back to the ranch; and hence it is impossible to trace the injury to the nature of the employee's work or the risks to which the employer's business exposed the employee as its sales manager. (*Ward v. Industrial Acc. Com.*, 175 Cal. 42, [L. R. A. 1918A, 233, 164 Pac. 1123].) The nature of his employment was not such as to expose him to the dangers incidental to the means adopted for his pleasure while on his vacation, and could not have been contemplated in connection with the employ-

ment. (*McNicol's Case*, 215 Mass. 497, [L. R. A. 1916A, 306, 102 N. E. 697].)

In our opinion, the injury sustained did not arise out of the employment, which fact must be made to appear in order to entitle an employee to compensation.

The award is annulled.

Conrey, P. J., and James, J., concurred.

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[Civ. No. 3309. First Appellate District, Division One.—May 7, 1920.]

F. E. KINNEY et al., Appellants, v. JOSEPH M. KING,  
Respondent.

[1] NEGLIGENCE—RIGHT OF WAY AT STREET INTERSECTION—VIOLATION OF ORDINANCE—CONTRIBUTORY NEGLIGENCE.—Where the traffic ordinance of a city requires that "The drivers of all vehicles must look out for and give right of way to vehicles approaching simultaneously from their right at street intersection," the driver of a vehicle who fails to yield the right of way to the driver of another vehicle approaching simultaneously from his right at a street intersection, as the result of which a collision occurs and the former is injured, is guilty of negligence as a matter of law directly contributing to his injury which bars recovery, notwithstanding the driver of the other car is guilty of negligence *per se* in approaching the intersection at an excessive rate of speed.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial. Chas. Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. E. Morris and W. I. Gilbert for Appellants.

Duke Stone and Norman S. Sterry for Respondent.

RICHARDS, J.—This is an appeal from an order granting a new trial in an action for damages resulting from an

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1. Violation of statute or ordinance giving one vehicle right of way as against another as affecting liability for injury, notes 12 A. L. R. 458; L. R. A. 1915D, 1021; L. R. A. 1917D, 693.



automobile collision. The plaintiffs upon the trial of the action before a jury were awarded a verdict in the sum of five thousand dollars damages. The defendant moved for a new trial upon several statutory grounds. The court granted said motion by an order which read as follows: "Defendant's motion for a new trial is granted solely upon the ground that, conceding the evidence given by the plaintiffs to be true, plaintiffs were not as a matter of law entitled to recover."

The plaintiffs have appealed from this order, and upon such appeal urge the single point that the trial court was in error in holding that the plaintiffs were guilty of contributory negligence, which, as a matter of law, would bar their recovery in this action. The respondent maintains that the trial court was right in so holding, and also undertakes to contend that there were certain other errors occurring at the trial which entitled him to a new trial, and devotes much space to a discussion of these alleged errors. We are of the opinion, however, that these matters are not proper subject of discussion upon this appeal in view of the limited form of the court's order in granting the motion for a new trial. We shall, therefore, confine ourselves to the single point urged by the appellants as a ground of reversal upon this appeal.

[1] The facts of the case, as testified to by the plaintiffs, were these: On the ninth day of January, 1916, the plaintiffs were proceeding in their Ford roadster automobile easterly on West 9th Street, in the city of Los Angeles, approaching the intersection of said street with Lake Street. West 9th Street is fifty feet wide between the curbs. Lake Street is forty-four feet wide between the curbs. At the same time the defendant was proceeding in a Cadillac car northerly on Lake Street approaching its intersection with West 9th Street. There was a retaining wall on the southwest corner of these two streets which would obstruct the view of persons driving easterly on West 9th Street or northerly on Lake Street until each was within a few feet of the respective lines of intersection. The plaintiffs were familiar with the conditions at that particular intersection since they lived but a few blocks westerly and passed there frequently. The plaintiff, F. E. Kinney, was driving his car, and as he came to the point of intersection was travel-

ing at the rate of ten or twelve miles an hour. As he came into view of Lake Street he saw the defendant traveling northerly on Lake Street somewhere between thirty and fifty feet from the line of intersection and going at a rate of from thirty to thirty-five miles an hour. The said plaintiff proceeded across Lake Street, swinging to the left in an attempt to avoid a collision, but failing in this effort since his car collided with that of the defendant at a point east and north of the center of the intersecting square of the two streets, from which collision the injuries resulted which give rise to this action.

The traffic ordinances of the city of Los Angeles, which it was stipulated were applicable to this intersection of these two streets and to the parties to this action, read as follows: "Any person who shall ride, drive or propel, or who shall cause or permit to be ridden, driven or propelled, any vehicle at a rate of speed greater than twenty miles per hour . . . along or upon any street in the city of Los Angeles (outside of certain business districts) . . . shall be guilty of a misdemeanor."

"The driver of every vehicle . . . shall drive such vehicle . . . in a careful manner with due regard to the safety and convenience of pedestrians and of vehicles and cars upon the streets upon which such vehicle or car is driven or operated."

"The drivers of all vehicles must look out for and give right of way to vehicles approaching simultaneously from their right at street intersections."

Under these terms of said ordinances it may be taken as established by the plaintiffs' evidence in the case that the defendant, in approaching the intersection of the two streets in question at a rate of speed exceeding thirty miles per hour, was guilty of negligence *per se*, but conceding this to be true, it must also be admitted, in view of the plaintiffs' own evidence, that when the plaintiff, F. E. Kinney, driving his automobile, approached the westerly line of intersection of these two streets he saw the defendant's automobile traveling at such rate of speed and at such a point on Lake Street as would bring the defendant's car in collision with his own if each proceeded along his respective line of approach at his respective rate of speed across such intersecting streets. This being so, the plaintiffs and the defendant

must be held to have been "approaching simultaneously such intersection" within the meaning and intent of the provision of the ordinance above set forth. It was, therefore, the plaintiff's plain duty under such ordinance to give to the defendant the right of way across such intersection, and this duty would be rather intensified than diminished by the fact that the defendant was seen by the plaintiffs traveling at an excessive and illegal rate of speed in making his approach to the point of intersection of these two streets, since the ordinance expressly requires drivers in the plaintiffs' position to "look out for" such vehicles as were entitled to the right of way. Clearly the plaintiffs, in attempting to proceed on their way across Lake Street, were, under the circumstances as detailed by themselves, acting in direct violation of the terms of said ordinance when, before entering upon such intersection, they saw the defendant approaching simultaneously such intersection on Lake Street at an excessive rate of speed and having the right of way. The same doctrine which renders the defendant's breach of this ordinance through exceeding the speed limit negligence *per se* renders also the plaintiffs guilty of negligence *per se* in essaying to cross Lake Street in front of the defendant and in disregard of his right of way. The plaintiffs offer as an excuse for their attempt to cross Lake Street in front of the defendant's car that, after seeing him, they would be unable to stop their car in time to avoid a collision; but this excuse is not adequate, since the plaintiffs were bound to so operate their car in making their approach to an intersection across which others had the right of way as to be able to stop within such distance as would permit said right to be exercised by those entitled to it and approaching simultaneously the intersection.

The case of *Bullis v. Ball*, 98 Wash. 342, [167 Pac. 942], deals aptly with the precise question involved in this case in construing a similar ordinance. It says: "The purpose of the ordinance giving to vehicles moving in a northerly or southerly direction the right of way at street intersections was to prevent collisions, to obviate the very exigency which here arose. It was foreseen that at some time vehicles approaching street intersections would very probably meet and collide. To prevent this the ordinance above referred to was enacted. Its purpose demands no explanation. It is

quite clear. The rights and duties which it creates are equally clear. The driver on the street running north and south must exercise that degree of care which is ordinarily commensurate with the safety and welfare of others with whom he may come in contact at street intersections. But while it is true that he must exercise ordinary care, the superior right to passage over the intersection is his. It is a right expressly conferred upon him by authoritative enactment, a right which must be observed and respected by others using streets at the points of intersection. This priority of right naturally and necessarily creates a corresponding duty on the part of the traveler using the street running east and west, a duty which consists in the exercise of a degree of care commensurate with the superior right of the person traveling the street running north and south. The duty necessarily implies that the driver of a vehicle on a street running east and west shall slacken speed for the purpose of observing vehicles approaching the intersection on the street running north and south, and should such vehicle be within a reasonable distance of the intersection to await until they have passed before attempting to continue across the intersection. The greater duty and the higher degree of care to be observed in such a situation is upon the person using the easterly and westerly street, if the ordinance in question is to be given any meaning, and any violation of this duty by the person injured which contributes in any appreciable degree to causing the collision in which his injuries are sustained will operate as a bar to his recovery."

Adopting these views, we are constrained to hold that the trial court was correct in ruling that the plaintiffs, in failing to yield to defendant the right of way under the circumstances of the instant case, were to be held guilty of negligence as a matter of law directly contributing to their injury, and hence were not entitled to recover in this action.

The case of *Whitelaw v. McGilliard*, 179 Cal. 349, [176 Pac. 679], relied upon by the appellants, does not present a state of affairs similar to that in the case at bar, since in that case there was evidence showing that the plaintiff who was injured had already entered upon and was nearly across the intersecting street at the time when the defendant ap-

proached it at an illegal rate of speed. It was not, therefore, a case of simultaneous approach.

The case of *Lawrence v. Goodwill*, 44 Cal. App. 440, [186 Pac. 781], also presents a dissimilar situation from that disclosed in the case at bar, and does not involve the right of the trial court to determine upon the uncontradicted testimony proffered by the plaintiffs whether their failure to yield to defendant, approaching simultaneously the intersection in question, the right of way across the same was negligence *per se* sufficient to prevent a recovery.

Order affirmed.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

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[Civ. No. 3361. First Appellate District, Division Two.—May 7, 1920.]

ADOLPH RAMISH, Respondent, v. MAX REICHENBACH et al., Appellants.

[1] APPEAL—ACTION FOR RENT—CONFLICTING EVIDENCE—FINDING.—

On an appeal from a judgment in favor of the plaintiff, in an action by the lessor against the trustees for the lessee, whom the lessor permitted to occupy the leased premises after the lessee became insolvent, such trustees agreeing to pay plaintiff the back rentals then due out of the first profits of the business, a finding of the trial court based upon conflicting evidence, to the effect that the defendants during their conduct of the business received sufficient moneys to have enabled them under the terms of their agreement with plaintiff to pay him the amount claimed to be due as rental for the premises, but that they used and disposed of such moneys in payment of other than necessary expenses of conducting and operating the business to an extent and in an amount sufficient to have paid plaintiff the amount due him, is conclusive on the appellate court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Edward F. Wehrle for Appellants.

Alfred H. McAdoo and David E. Bergman for Respondent.

NOURSE, J.—Defendants appeal from a judgment rendered against them as involuntary trustees on plaintiff's complaint for rent of premises occupied by defendants in the double capacity as trustees for creditors and assignees of the insolvent under an assignment made for the benefit of all creditors of the insolvent other than plaintiff. [1] The controversy arises through the fact that after the defendants were appointed trustees for the creditors a written agreement was made between them and plaintiff whereby plaintiff agreed to permit defendants to continue the occupation of the premises theretofore leased to the insolvent and the defendants promised to pay to plaintiff the back rentals then due out of the first profits of the business. By the pleadings it is admitted that defendants also agreed to pay the expenses of conducting or operating the business, including the payment of the monthly rental and water charges for the premises occupied, before distributing or paying to the other creditors anything upon the indebtedness due them. During the course of their conduct of the business the defendants paid certain sums to an agent of one of the creditors and other sums to the attorney for the creditors, leaving in their possession insufficient moneys to meet the payment for the current rental admitted to be due to plaintiff. Upon the trial it was contended on the part of plaintiff that the moneys so paid out were for services rendered to the creditors, and defendants claimed that such payments were necessary and proper expenses of conducting and operating the business by the trustees. Plaintiff also asked for an accounting upon the theory that though he was not a party to the original assignment for the benefit of creditors, the defendants by their special agreement with him became involuntary trustees for his benefit. The trial court found that the defendants during their conduct of the business received sufficient moneys to have enabled them under the terms of their agreement with plaintiff to pay him the amount claimed to be due as rental for the premises, but that the defendants used and disposed of such moneys, not in payment of the necessary expenses of conducting and operating the business, to an extent and in an amount sufficient to have paid plaintiff the amount due him.

The whole argument of appellants on this appeal resolves itself into an attack upon this finding as not supported by

the evidence. There was substantial evidence tending to prove that one Brown, to whom payments were made for services rendered in checking up the cash and doing certain clerical work, was engaged by one of the creditors and not by the trustees, also that such services were for the benefit of the creditors charged and were not necessary for the operation of the business under the trustees. There was also evidence that the attorney to whom other payments were made was employed by the creditors to prepare the original trust agreement and assignment, that he was not employed by either of the trustees, and that he rendered little, if any, legal services to them directly. The evidence on the part of appellants tending to show that some of these services were rendered for and at the request of the trustees merely presents a conflict upon which the trial court was required to find. The finding so made, being based upon conflicting evidence, is conclusive upon this appeal, and for these reasons the judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

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[Civ. No. 2164. Third Appellate District.—May 7, 1920.]

DUNNING BROTHERS COMPANY (a Corporation),  
Respondent, v. WALDO S. JOHNSON, Appellant.

[1] QUIETING TITLE — INCORRECT DESCRIPTION — MUTUAL MISTAKE — EQUITY.—Where the parties to an action to quiet title, by mutual mistake, incorrectly describe the property and the mistake in the description is contained in the judgment entered therein, in a subsequent action to quiet title and to correct the description a court of equity has the power to correct the mistake.

APPEAL from a judgment of the Superior Court of Yuba County. Eugene P. McDaniel, Judge. Affirmed.

The facts are stated in the opinion of the court.

Waldo S. Johnson, *in pro. per.*, J. E. Ebert and W. E. Davies for Appellant.

W. H. Carlin for Respondent.

NICOL, P. J., *pro tem.*—This is an appeal from a judgment of the superior court of Yuba County quieting title of plaintiff to three lots in the city of Marysville and correcting a mistake in the description of the said lots as contained in a judgment entered in the case of *John Martin v. Chester A. Smith et al.*

On December 4, 1914, the defendant Waldo S. Johnson purchased at a tax sale made by the tax collector of the said city of Marysville the three lots in question and received a certificate of sale for the same. Thereafter in December, 1915, Johnson demanded a deed for the lots in accordance with the certificate of sale and John Martin, then the owner of the lots, brought suit to quiet his title to the same and also to cancel the said certificate of sale. Judgment was entered in favor of Martin from which Johnson appealed to the supreme court and the judgment was affirmed on September 5, 1918. (*Martin v. Smith et al.*, 178 Cal. 812, [175 Pac. 16].)

On September 12, 1917, Martin and his wife deeded the lots in question to Dunning Brothers Company, the plaintiff in the present action. At the time of the making of this deed it was discovered for the first time that there was a mistake in the description of the lots as contained in the pleadings and judgment in the said case of *Martin v. Smith et al.* in this, that throughout all the proceedings in said case as well as in the judgment the lots were described as lots 2, 3, and 4 of block 1, in range letter "J," instead of in range letter "I," as the lots, blocks, and ranges are laid down, numbered, and designated upon the record map of said city of Marysville. The present suit was subsequently commenced to quiet plaintiff's title to the lots and for a decree correcting the mistake contained in the said judgment.

[1] Upon the question of mistake the court upon ample and sufficient evidence found as follows: "That, however, by inadvertence throughout all the pleadings in said action tried as aforesaid, and in said judgment, said lots of land above mentioned were described as being in range letter 'J,' instead of the true range, namely, range letter 'I' in said city. Said mistake was mutual between all the parties to said action and the cause was commenced, tried, and determined upon the theory, and upon the belief upon the part of all the parties to said action and on the part of the court



determining the same, that said lots were in said pleadings correctly described. While in truth and in fact the description thereof was incorrect, locating said lots in range letter 'J,' instead of the true range, namely, range letter 'I' in said city."

That a court of equity has the power to correct a mistake like the one here in question is too plain to admit of doubt. In *Quivey v. Baker*, 37 Cal. 465, a mortgage by mistake described a different lot from the one intended by the parties to be mortgaged. In fact, there was no such lot as the one erroneously described. Suit was afterward commenced to foreclose the mortgage, the complaint describing the property by the same erroneous description contained in the mortgage. In the decree of foreclosure and in the sheriff's deed was the same mistake in description. It was held that an action would lie to correct all the mistakes and that equity will go back to the original transaction and reform all three so as to make them conform to the original intention of the parties. (See, also, *Busey v. Moraga*, 130 Cal. 586, [62 Pac. 1081]; *Donald v. Beals*, 57 Cal. 399.) In *Bacon v. Bacon*, 150 Cal. 477, [89 Pac. 317], it was held that, "The power of a court of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends also to judgments wrongfully given by reason of mistake either of the court or of the injured party unmixed with fraud, and not the result of the negligence of the injured party." In *Partridge v. Harrow*, 27 Iowa, 96, [99 Am. Dec. 643], there was a judgment ordered by the district court in favor of plaintiff, in an action on a note, and the clerk was directed to assess the amount due; that by mistake the clerk assessed the amount due at \$223.36, instead of \$370, and judgment was entered accordingly; defendants appealed to the supreme court and the judgment was affirmed; an execution was issued on the judgment and the amount thereof collected; thereafter, and more than one year after the rendition of the judgment, the mistake was discovered. The court said: "The fact that the judgment of the district court had been affirmed in this court did not deprive that court of jurisdiction of this case. The judgment, as entered in the district court, was appealed from and affirmed, but that affirmance does not operate to prevent the correction of the judgment by the district court in respect to a matter that

was not passed upon by this court. The petition shows that the affirmance of the judgment in the amount as rendered by the district court was also a mistake, and it cannot be doubted that such mistake may likewise, by proper proceedings, be corrected."

The demurrer interposed by the defendant to the complaint was properly overruled by the court and we find no error in the record.

The judgment appealed from is affirmed.

Hart, J., and Burnett, J., concurred.

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[Crim. No. 494. Third Appellate District.—May 8, 1920.]

THE PEOPLE, Respondent, v. RAYMOND WHITE,  
Appellant.

- [1] **CRIMINAL LAW—RAPE—FABRICATION OF DEFENSE BY CODEFENDANTS—EVIDENCE.**—In a prosecution of a defendant charged jointly with another with the crime of rape, evidence of a conversation between the two defendants while they were confined in jail before the trial, which was indicative of a purpose on the part of both defendants to fabricate a defense to the charge, is properly submitted to the jurors for their consideration.
- [2] **ID.—AMENDMENT OF INFORMATION—CHANGE OF NAME OF PROSECUTRIX—LACK OF PREJUDICE—WAIVER OF OBJECTION.**—A defendant convicted of the crime of rape may not, for the first time, on appeal, raise the objection that he was prejudiced by the action of the trial court in permitting the district attorney, after the jury was impaneled, to amend the information on its face by correcting the name of the prosecutrix, the cause having thereafter proceeded to trial without any objection or suggestion that a different offense had been charged by changing the name of the prosecutrix.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles Kasch for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—Appellant was convicted of the crime of rape and he appeals from the judgment and the order denying his motion for a new trial. He was jointly charged with one Willard Carlson but he was tried separately. The prosecutrix was fifteen years of age, and the evidence shows quite conclusively that she was the victim of a brutal assault committed by the defendants acting in concert. Indeed, it would have been surprising if the jury had failed to convict appellant. We make these observations to indicate in what light we should view the two alleged errors upon which appellant relies for a reversal. [1] The first of these relates to the introduction in evidence of a conversation between the two defendants while they were confined in jail before the trial. The testimony was given by a constable, who was secreted in one of the cells near those occupied by White and Carlson. Their statements were purely voluntary and they were indicative of a purpose on the part of both defendants to fabricate a defense to the charge. At least, the statements were capable of such construction, and it was entirely proper to submit them to the jurors for their consideration. The statements are too indecent for publication, but it is sufficient to say that they agreed as to what their testimony should be. That they should consider it necessary to make such agreement affords some evidence of a guilty mind. Innocent men might inquire of each other as to their recollection of an event or their knowledge of an alleged offense, but they are not at all likely to plunge immediately into a proposal and acceptance of a certain definite statement to be made by each in answer to a criminal charge. We are entirely satisfied that it was a proper circumstance for the jury to consider, but at any rate, under the rule that now prevails in this state, if the ruling was erroneous, it should not operate to overthrow the verdict.

[2] The other objection is probably worthy of more serious consideration. As to it the only record is contained in the following minutes of the clerk: "The jury being now complete . . . the clerk thereupon read the information to the jury and stated defendant's plea of not guilty. Thereupon the district attorney requested and was granted permission of the court to amend the information on its face by striking out the word Carlsen and inserting in lieu thereof the word Larsen." In reference to this matter,

appellant asseverates that he "was denied the right of trial by jury. The jury that returned the verdict was never impaneled or sworn to try him on the charge upon which he was convicted. At the time the jury that convicted him was sworn, the charge upon which he was convicted had not been filed against him. He never had an opportunity to challenge peremptorily or for any cause any of the jurors. In short, this was the most irregular trial which, in my opinion, has ever been submitted for review." This is assuredly quite a picturesque and impressive impeachment of the district attorney and the trial judge, but it is entirely unwarranted by the facts in the cause. We are justified in representing the situation as follows: Appellant was regularly and properly charged by an information with said crime committed June 30, 1919, in said county of Mendocino, against the person of Jennie Carlsen. He was arraigned and pleaded not guilty and the case was set for trial. A jury was impaneled according to law and then the district attorney ascertained that a clerical mistake had been made in stating the name of the prosecutrix, that her real name was Jennie Larsen, and not Carlsen, as it appeared, and asked the court's permission to make the change. To this request no objection was made by appellant and by his silence he acquiesced in the suggestion. Thereupon the court granted permission to have the mistake thus corrected. This was done and the cause proceeded to trial without any objection or suggestion that a different offense had been charged by changing the name of the prosecutrix, it being understood by all parties that only one offense was claimed by the district attorney and that the amendment was sought for the reason already stated. The trial disclosed the name of the prosecuting witness to be Jennie Larsen, and it was shown very clearly that at the time and place and in the manner alleged in the information said offense was committed against her. He was convicted, and, for the first time, on appeal, he makes the point that another offense was charged by the amendment and that for such offense he was never arraigned and was not legally put upon trial. Under such circumstances, can he successfully urge such objection? To ask the question is to answer it. The court had the right to permit the error to be corrected, it was plainly its duty to do so, and such action would not have been subject to objection, if any had been

made. But, as we have seen, appellant acquiesced in the course that was pursued, and that affords an additional reason why he should not now be heard to complain. It is true that we have stated the case more fully than the record discloses, but as to this point we simply have the minutes of the clerk; they do not purport, nor are they expected, to contain the whole record, and the presumptions are in favor of the regularity of the proceedings. In the absence of any showing to the contrary we have a right to assume, therefore, what is altogether probable, namely, that the change was made for the reason suggested.

As to another arraignment and another plea, they were, of course, not called for, since but one offense was charged, and as to that the defendant was allowed every right which the law provides. It would have been an idle and foolish thing to repeat the arraignment and to reimpanel the jury simply because the court had permitted an amendment to the information for the purpose of properly identifying and describing the offense that was committed by the appellant.

We may add that the court would have inherent power to permit such a clerical mistake to be corrected, but section 1008 of the Penal Code expressly authorized amendments as follows: "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant."

Of course, there was no prejudice to the substantial rights of the defendant caused by the course herein pursued. Indeed, if we may assume that the proceedings were irregular, then, no substantial wrong has been committed, and no injustice has been suffered. In this connection, the case of *People v. Tomskey*, 20 Cal. App. 672, [130 Pac. 184], may be read with interest and profit. It is ample authority to justify the rejection of appellant's contentions as opposed to the established principles of modern criminal procedure.

We think the judgment and order should be affirmed and it is so ordered.

Hart, J., and Nicol, P. J., *pro tem.*, concurred.

[Civ. No. 3095. Second Appellate District, Division One.—May 8, 1920.]

**WILLIAM P. BOLAND, Respondent, v. STANLEY W. SMITH et al., Appellants.**

- [1] **CONTRACTS—PURCHASE OF AUTOMOBILE—ACTION FOR RESCISSION—TIME OF DELIVERY—PAROL TESTIMONY.**—In an action to enforce rescission of a contract for the purchase of an automobile which does not fix the date of delivery, it merely being stated in the contract that delivery is to be made "on or about out of first shipment of this model," nothing therein being shown as to whether the shipment of automobiles had already been ordered or as to when such shipment would be made, it is proper for the court to receive testimony touching the representations and statements made by the vendors on the subject of delivery.
- [2] **ID.—REJECTION OF TESTIMONY—INCOMPLETE RECORD ON APPEAL—PRESUMPTION IN FAVOR OF RULING.**—Where the record on appeal in such action shows that the trial court refused to permit the defendants to introduce testimony in support of the allegations of their cross-complaint concerning a prior transaction, on the ground that the condition of the evidence was such that they were not entitled to introduce any evidence whatever regarding such former transaction, but such record does not contain all the testimony heard at the trial, it must be presumed that the condition of the case was such as to support the ruling.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Leo V. Youngworth and Harry J. McClean for Appellants.

J. Wiseman Macdonald for Respondent.

**JAMES, J.**—Carlin G. Smith brought this action to enforce rescission of a contract for the purchase of an automobile. Judgment was awarded in accordance with the prayer of the complaint, and defendants appeal. (After judgment there was a substitution of parties plaintiff by reason of an assignment made by plaintiff Carlin G. Smith to Boland.)

On June 12, 1912, plaintiff Smith negotiated with defendant Stanley W. Smith and C. F. Smith, since deceased, for the purchase of an automobile, and on that date paid a deposit of five hundred dollars. A written contract in the form of a memorandum order was drawn up and signed by the purchaser and the vendors. The automobile was not at the time in the hands of the vendors ready for delivery, but was to be shipped from the factory at an eastern point, and the written contract provided that the delivery was to be made "on or about out of first shipment of this model." The signature of the plaintiff first appeared attached to the order, and over the signature of the vendors was the following clause: "We agree to fulfill all the terms and conditions of this order, subject to delay resulting from fires, strikes, action of elements, and other circumstances beyond our control." No delivery of the car having been made, on the 25th of November, 1912, the plaintiff served a written notice of rescission upon the vendors and demanded the return to him of the five hundred dollars deposited. The court, in its findings of fact, recited that defendants had represented to plaintiff that they had several shipments of models of the kind of car desired coming and that the first shipment would reach Los Angeles on or about the first day of July; that the defendants failed to make delivery of the car on July 1st, but stated to plaintiff that shipment had been delayed and that the car would be shortly delivered, and at various times between July 1st and October 17, 1912, the vendors represented and stated that shipment of said car would shortly be made; that on the seventeenth day of October the vendors specifically promised and agreed to make delivery of the car not later than three weeks from that date, to wit, not later than November 17, 1912; that the vendors received a shipment of the model of the car contracted to be delivered on or about the twenty-fifth day of December, and on the 26th of that month notified the plaintiff of the receipt of the car and offered to make delivery thereof. The court further found "that defendants have wholly refused and failed to make delivery of any car under the terms of their contract with the plaintiff within a reasonable time, and have failed and refused to return to plaintiff the sum of five hundred dollars."

[1] One of the contentions of the appellants here is that the court erred in admitting the oral testimony of the plaintiff touching the time that it was understood the automobile would be delivered, the claim being that the effect of such testimony was to vary the terms of the written contract. The testimony referred to was given by the plaintiff and, as set forth in the bill of exceptions, is as follows: "I had a conversation at the time the contract was made regarding the time of delivery. Mr. Smith said he would deliver the car between the first and fifteenth of July, that year. I had a further conversation with Mr. Smith, of Smith Brothers, in August of 1912. I called on Mr. Smith and asked him when I was to get my car; and he said, 'We expect it any day.' I went in his place every once in a while to find out when he was to make delivery. On August 17th he called at my office to collect a bill for repairs. I said: 'When am I going to get my car?' He said, 'You will get your car within two weeks.' I called in two men, Mr. Sadler, who was in my office, and Mr. Rending, and asked them to listen to the conversation. I said, 'Clarence, you promised me delivery within two weeks.' He said, 'You will get your car within two weeks.' I said, 'I will give you three weeks; if I don't get my car within three weeks, I want my money.' He said, 'You will have the car or your money,' and he left and walked out. I made a memorandum of that conversation on the contract that he had signed and given to me. The car was not delivered on November 7th. I signed a notice of rescission, which was served on Mr. Smith."

Section 1860 of the Code of Civil Procedure provides: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." We think that the testimony was competent to explain the conditions, in view of the fact that no date of delivery was fixed in the written contract and nothing therein was shown as to whether the shipment of automobiles had already been ordered or as to when such shipment would be made. In our opinion, under the terms of the contract, it should be said that the obligation of the vendors was to have delivery



made of the car within a reasonable time. What would amount to a reasonable time for shipment from the east and receipt in Los Angeles, would depend upon conditions within the knowledge of the vendors, and for that reason we think it was proper for the court to receive testimony touching the representations and statements made by the vendors on the subject of delivery. While in the plaintiff's testimony conversations were shown between the plaintiff and one of the vendors, which conversations occurred subsequent to the making of the contract, those conversations were not relied upon by the trial judge as fixing a new and definite date upon which the automobile was agreed to be delivered, but only as showing the continuing conditions as to the non-delivery and the explanations made by the vendors in attempted excuse of the same, all of which was competent as going to the question as to whether at the time the plaintiff gave notice of rescission there had been an unreasonable delay on the part of the vendors in the delivery of the automobile. The court directly determined that the delay was unreasonable and, upon the evidence shown, we think that that conclusion was justified.

[2] A second contention of the appellants relates to the matter of another transaction had between the parties prior to the making of the particular contract here involved. In a cross-complaint defendants alleged facts concerning the prior transaction under which it seems the plaintiff had first bargained for a different automobile, which he received, and that he later returned the automobile, with the consent of the defendants, and forfeited some money which he had paid thereon. In the findings of the trial court it is determined that the transaction last referred to was distinct and separate from that sued upon by the plaintiff, and that the rescission of the former contract was not, as defendant asserted, a part of the consideration for the making of the contract to enforce rescission of which this action was brought. Appellants contend that the court refused to admit testimony offered by them in support of matters contained in the cross-complaint. We are unable to determine from the bill of exceptions as to what testimony was offered to that point. The bill of exceptions does not purport to contain all of the testimony heard at the trial. As to the offered testimony we find in the record, among the specifica-

tions, this statement: "In reply to defendants' offer to prove the facts of the prior transaction as pleaded in the cross-complaint the court said: 'I just want the records to show that you started to prove other considerations for this contract not stated therein relative to the matter pleaded in the cross-complaint, and the court refused to hear it on the ground that as the evidence stands at this time you are not entitled to introduce any evidence whatever regarding the former transaction between these parties. In other words, that the court confines you to mutual obligations created by the written contract pleaded by you on the ordering of this car.' " As to how the evidence stood, as the court phrased it, at the time the judge made that statement, we are not enlightened. We can assume that such a showing had been made as would have justified the ruling as expressed by the judge, and that being true, we must presume that the condition of the case in its evidence was such as to support the ruling.

No other points are presented which require consideration or discussion.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

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[Civ. No. 2816. Second Appellate District, Division One.—May 8, 1920.]

BARR LUMBER COMPANY (a Corporation), Respondent,  
v. JOY CONSTRUCTION COMPANY (a Corporation),  
et al., Appellants.

- [1] STREET LAW—VROOMAN ACT—DATE OF ACTUAL COMPLETION OF WORK—CONFLICTING EVIDENCE—FINDING—APPEAL.—On appeal from the judgment in an action by a materialman against the sureties on a bond given by a contractor under the Vrooman Act, the appellate court is bound by the finding of the trial court as to the date of actual completion of the work, where that finding was based on conflicting evidence.
- [2] ID.—CONTROVERSY OVER WORK—COMPLETION TO SATISFACTION OF STREET SUPERINTENDENT—VERIFIED STATEMENTS BY MATERIALMEN—TIME FOR FILING.—Where a contract for certain street improve-

ments provides that the work is to be done to the satisfaction of the street superintendent and, notwithstanding the specifications call for the wetting down of the curbing for a period of seven days, the street superintendent insists that the specifications require that the cement be wet down for ten days, and the foreman for the contractor acquiesces in the street superintendent's demand to wet it for ten days, and does so, the thirty days within which materialmen must file their verified statements with the street superintendent commences to run from the date of actual completion of the work.

- [3] **ID.—SUFFICIENCY OF VERIFIED CLAIMS FILED—SURPLUS MATTER IMMATERIAL.**—In this action against the sureties on a bond given by a contractor under the Vrooman Act, the verified claims filed with the street superintendent sufficiently complied with the requirements of section 6½ of said act; and such claims were not rendered insufficient by the statement made in each of them "that the said undersigned claims a lien upon any moneys, warrants, or bonds for the said sum aforesaid on account of said material so furnished for said improvement."

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Dana R. Weller, Judge. Affirmed.

The facts are stated in the opinion of the court.

Newmire & Watkins for Appellants.

Behymer & Craig for Respondent.

**CONREY, P. J.**—Appeal by the defendants W. R. Hefley and Charles C. Hayes from a judgment entered against them as sureties on a bond given by a contractor under the street improvement law known as the Vrooman Act. (Deering's Gen. Laws, 1915 edition; Act 3930, p. 1714.) The plaintiff sued on a claim for materials furnished by it, and on two assigned claims of a similar nature, all being for materials used by the contractor in performance of the work. After the work had been actually completed, verified statements were filed with the street superintendent of the city of Whittier, with whom the contractor had made his contract, as follows: On May 24, 1916, by the plaintiff; on May 25, 1916, by plaintiff's assignor, A. H. Gregg; and on May 24, 1916, by plaintiff's assignor, C. Forsyth & Son. It is claimed by plaintiff that these notices were filed in conformity with the requirements of section 6½ of said statute.

The street superintendent accepted the work constituting said improvement on the twenty-third day of June, 1916. Additional notices of claim were filed with the street superintendent by the plaintiff and by Gregg on July 21, 1916, and by C. Forsyth & Son on July 28, 1916. As to these July notices, their sufficiency need not be discussed, if the earlier notices were filed within time and in due form.

Appellants claim that all of the notices were filed more than thirty days from the time the improvement was completed, and that therefore, under the terms of said section 6½, they were all filed too late, and that for that reason any right of action on said claims was lost. In the case of *Pacific Sewer Pipe Co. v. United States F. & G. Co.*, 32 Cal. App. Dec. 186, [197 Pac. 332], in which the decision of this court has this day been filed, it is held that the thirty days, not later than the end of which the claimant was required to file his statement with the board of public works (street superintendent, in the instant case), begins to run from the date of the actual completion of the work, and not from the date of the acceptance of the work by the board of public works or street superintendent. [Editor's note: For decision of supreme court, on rehearing of *Pacific etc. Co. v. United States etc. Co.*, *supra*. See 185 Cal. 515, 197 Pac. 332.] [1] The principal question then is, whether or not the notices filed with the street superintendent on May 24th and May 25th were filed within thirty days from the time the improvement was completed. The finding of the court is that the construction work under the contract was completed on the 25th of April, 1916, and not earlier than that date. Appellants claim that this finding is not supported by the evidence and that, as shown by the evidence, the work was completed not later than April 21, 1916. There is positive testimony that the work of construction, exclusive of what is known as the wetting down process which follows the laying of the cement, was completed on April 15th. It was stipulated by plaintiff's counsel that the specifications called for the wetting down of the curbing for a period of seven days, and that the work was to be done in a good and workmanlike manner and to the satisfaction of the street superintendent of the city of Whittier. At about the time when the work was ready for the wetting down process to begin, a conversation occurred

between Wilson, the contractor's foreman, and Stevens, the street superintendent, in which conversation the superintendent insisted that the specifications required that the cement be wet down for ten days, whereas the foreman contended that they called for seven days. The testimony of the foreman is that he acquiesced in the superintendent's demand to wet it for ten days, and did so; and that he finished the wetting of the curb on April 24th. The street superintendent testified that this work was done up to and including April 25th. [2] On this conflicting evidence we must accept the court's finding that the work was completed on and not before April 25th, unless we accept appellant's contention that the last three days of the wetting down process are not to be considered as a part of the completion of the contract, and that therefore the work must be held to have been completed at least as early as April 22d. But with this contention we do not agree. Since the work was to be done to the satisfaction of the street superintendent, and since there was a controversy between the parties as to what would constitute a sufficient wetting down process to make the work satisfactory, and since that controversy was actually settled by continuance of the work for the period required by the street superintendent in order to make the work satisfactory to him, it is our opinion that the work should not be deemed to have been completed until the twenty-fifth day of April. This being so, the notices of May 24th and May 25th were filed with the street superintendent within due time.

Finally, it is contended that the first set of notices and claims filed did not comply with the requirements of section 6½ of the statute, because the form of verification in each of the claims was defective in that the verified statements did not contain an allegation that the plaintiff's claim, or some part thereof, has not been paid, and did not show when the various items of materials were furnished. It is also claimed that the Barr Lumber Company's claim was defective in that the affidavit of verification does not show that the verification was made by O. H. Barr on behalf of the corporation; also that the claims do not purport to hold the bondsmen responsible. The Barr Lumber Company's claim was signed, "Barr Lumber Company, By O. H. Barr, President." The affidavit of verification is signed "O. H. Barr,"

and the said O. H. Barr, "being first duly sworn, deposes and says that he is the president of the Barr Lumber Company, the corporation claimant above named; that he has read the foregoing claim and that the facts therein stated are true." In each of the other claims the affiant, who was one of the claimants, stated in his affidavit of verification that he had read the foregoing claim, "and that the facts therein stated are true." In each of the claims a statement of the demand was made and that the amount so claimed "is now due, owing and unpaid." The plaintiff's claim further stated that of the total amount which the contractor had agreed to pay for the materials furnished, "no part of the same has been paid," except a stated sum. The other claims filed specifically stated "that no part of the same has been paid." We think that these statements of the verified claims were sufficient to comply with the requirements of the statute. We further hold, contrary to the contention of appellants, that these claims as filed were not rendered insufficient by the statement made in each of them "that the said undersigned claims a lien upon any moneys, warrants, or bonds for the said sum as aforesaid on account of said material so furnished for said improvement." Conceding that the last-quoted words were not required to be in the notice, we cannot see that appellants, sureties on the contractor's bond, could have been in any manner misled or otherwise prejudiced thereby.

The judgment is affirmed.

James, J., concurred.

Shaw, J., concurred in the judgment.

[Civ. No. 2937. Second Appellate District, Division One.—May 8, 1920.]

COUNTY OF TULARE, Respondent, v. R. W. FENN,  
Appellant.

[1] BAIL—FORFEITURE BY RECORDER—RIGHT OF COUNTY TO MONEY—  
PAYMENT TO CITY—ACTION TO RECOVER—WANT OF DEFENSE.—  
Money collected as a forfeiture of bail for nonappearance to answer a felony charge before a recorder of a city of the sixth class, sitting as a magistrate of the county, belongs to the county and not the city; and the fact that such magistrate has mistakenly paid out such money, even in good faith, to the city, does not constitute a defense to an action by the county to recover the same.

APPEAL from a judgment of the Superior Court of Tulare County. J. A. Allen, Judge. Affirmed.

The facts are stated in the opinion of the court.

Chas. W. Braswell for Appellant.

Fred C. Scott, District Attorney, and Frank Lamberson for Respondent.

CONREY, P. J.—In December, 1917, while the defendant was acting as a magistrate of the county of Tulare under and by virtue of his office as recorder of the city of Lindsay in that county (said city of Lindsay being a city of the sixth class), he received a complaint in writing made to him as such magistrate, charging one Ah Wong with the commission of a felony. Such proceedings were had that said magistrate received from the said Ah Wong the sum of five hundred dollars as bail and undertaking that the said Ah Wong would appear, etc., as required. At the time set for the examination of Ah Wong before the defendant upon said charge of felony Ah Wong did not appear. Thereupon the said Fenn, acting as magistrate, entered the fact of such nonappearance upon the minutes of the recorder's court of the city of Lindsay, and did declare said sum of five hundred dollars to be forfeited by the said Ah Wong. That forfeiture has become final; nevertheless, the defendant has not paid said sum to the treasurer of the county of Tulare.

On these facts, which are pleaded more fully in the complaint, the county of Tulare brought this action to recover judgment against the defendant for said sum of five hundred dollars. By his answer to the complaint the defendant admitted the allegations of the complaint, except that the defendant denied that there is due, owing, and unpaid from the defendant to the plaintiff the said sum, or any sum whatever. An affirmative defense was also pleaded, under which it was claimed that the money forfeited as aforesaid was forfeited to the city of Lindsay and not to the county of Tulare, and the money paid over to the said city of Lindsay. On the pleadings above mentioned, the plaintiff moved for a judgment on the pleadings. Said motion having been granted, judgment was entered accordingly, and the defendant appeals therefrom.

[1] In support of the plaintiff's claim of right to the money in question, we are first required to consider certain sections of the Penal Code in the chapter which relates to the taking of bail. "Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail." (Pen. Code, sec. 1268.) Section 1295 permits the deposit of money instead of an undertaking in writing. Section 1307 reads as follows: "If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, at the end of thirty days, unless the court has before that time discharged the forfeiture, pay over the money deposited to the county treasurer."

Notwithstanding the provisions of section 1307 of the Penal Code, appellant contends that the money deposited with him by Ah Wong was rightfully forfeited to the city of Lindsay under and by virtue of the provisions of section 1457 of the Penal Code, which section is a part of the chapter entitled "Proceedings in Justices' and Police Courts," being chapter 1 of title XI of part II of that code. It is provided in that section "that all fines and forfeitures collected in any police court or city justice's court that is maintained, and the salaries of the officers thereof paid by the city, whether prosecuted for a violation of a state law or a city ordinance shall be paid to the city treasurer of the city in which such court is located." See, also, section



1570 of the Penal Code, to like effect. It is conceded that defendant's salary as recorder was payable by the city of Lindsay.

The money in question here was not payable to the city treasurer of the city of Lindsay, unless as a forfeiture it was collected in the recorder's court in its character as a police court and in connection with an action prosecuted therein. But it was not so collected. The recorder's court in a city of the sixth class has jurisdiction concurrently with justices' courts "of all actions and proceedings, civil and criminal, arising within the corporate limits of such city or town, and which might be tried in such justice's court." The recorder is judge of the recorder's court, and it is provided that he "shall have the powers and perform the duties of a magistrate." (Municipal Corporations Act, secs. 882, 883; Deering's Gen. Laws, 1915 ed., p. 1132.) "A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense." (Pen. Code, sec. 807.) "The following persons are magistrates: 1. The justices of the supreme court; 2. The judges of the superior court; 3. Justices of the peace; 4. Police magistrates in towns or cities." (Pen. Code, sec. 808.)

Since the charge on which Ah Wong was held under arrest was not for a misdemeanor triable in the recorder's court, but was a charge of felony, the defendant Fenn could not act in that matter except as a magistrate. The power of justices of the peace and police judges to hold examinations and commit persons to be held on charges of felony or misdemeanor triable in the superior court is derived from the character of those officers as magistrates, and not as justices of the peace or judges of police courts. This office of magistrate is purely a statutory one, "and the powers and duties of the functionary are solely those given by statute." (*People v. Cohen*, 118 Cal. 74, 78, [50 Pac. 20]; *People v. Crespi*, 115 Cal. 50, [46 Pac. 863].) Even a justice of the supreme court, or a judge of the superior court, if he sees fit to assume the duties of a committing magistrate, "is not accompanied in the discharge of those functions by any of the general or implied powers . . . which surround him when sitting as a court of record." (*People v. Cohen*, *supra*.)

In acting as custodian of bail money, and in paying out such money to the public treasury after the forfeiture, the magistrate is an agent of the state, not acting in a judicial capacity. Therefore the decisions referred to by counsel for appellant, to the effect that a judge is not to be held responsible in a civil suit for any judicial determination made by him, are not applicable to this case. The defendant is liable to the county, in an action prosecuted by the district attorney, for money held by defendant which is by law payable into the treasury of the county. It is immaterial to the plaintiff's cause of action that the defendant has mistakenly paid out that money, even in good faith, to some other person or corporation.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

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[Civ. No. 3242. First Appellate District, Division One.—May 10, 1920.]

ADA HINCKSMAN, Respondent, v. ERNEST WALTER SMITH DELACOUR et al., Appellants.

- [1] **VENDOR AND VENDEE—EJECTMENT BY VENDOR—VENDEE IN POSSESSION—EQUITABLE DEFENSES.**—Vendees in possession, under a contract of purchase, not having performed their contract, and being in default with their payments, cannot maintain an equitable defense to an action of ejectment by the vendor.
- [2] **ID.—FRAUD OF VENDOR—REMEDIES OF VENDEE—DEFAULT—EJECTMENT.**—Vendees in possession, under a contract of purchase which they were induced to enter into through the false and fraudulent representations of the vendor, must pay the purchase price, according to the contract, and receive such title as the vendor is able to give, if they choose to retain possession of the land, or they may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the other expenditures, after deducting therefrom the fair rental value of the premises. Refusing to adopt either course, they are liable to an action of ejectment by the vendor, in which they are not entitled to recover the purchase money paid.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Affirmed.

The facts are stated in the opinion of the court.

Clarence S. Preston for Appellants.

Fred O'Farrell for Respondent.

WASTE, P. J.—This is an action brought by plaintiff, as vendor in a contract for the sale of real estate, against the defendants, who were vendees in possession, to recover possession of the land, and damages for the retention thereof, after alleged breach of the contract in failing to make payments, and for a judgment declaring the contract to have been broken, quieting plaintiff's title to the land, and for general equitable relief.

The defendants in their amended answer to the complaint denied a willingness on the part of the plaintiff to carry out the terms of the contract, and pleaded an affirmative equitable defense, based upon the ground of false and fraudulent representations, made to induce them to purchase the land. The same affirmative matter was set up in an amended cross-complaint, with a prayer for a rescission of the contract, and for an accounting of moneys paid to the plaintiff, and a finding as to the amount cross-complainants had expended in the necessary and proper care and maintenance of the property, and for judgment therefor. Plaintiff demurred to the amended answer and amended cross-complaint, and moved to strike out all the affirmative matter contained therein. The demurrer to the amended cross-complaint was sustained without leave to amend, and the court struck from the answer all of the affirmative matter pleaded as a defense.

By the judgment of the lower court plaintiff was awarded the immediate possession of the land, the contract of sale was canceled, and the plaintiff was given nominal damages for the detention. Defendants appeal on the judgment-roll claiming error on the part of the lower court in sustaining the demurrer to the amended cross-complaint, and in striking from the answer the matter alleged by way of an equitable defense. They also contend that the judgment was

erroneous in giving the plaintiff possession of the land without a return of the purchase price.

Under the contract of sale entered into by the parties on February 8, 1912, the defendants agreed to pay the plaintiff the sum of \$18,000 for the land, \$6,000 of which sum was paid when the contract was executed, the balance to be paid in semi-annual installments of \$500 each until the entire purchase price was paid, the first payment to be made on August 8, 1912. The defendants took immediate possession of the land and have continued in possession thereof ever since. They made the payment of \$500, due August 8, 1912, a payment of \$250 on February 10, 1913, and a payment of \$250 on August 8, 1913, since which time they have paid nothing on the contract. On December 27, 1916, the plaintiff, in writing, notified the defendants that they were in default, and that she insisted upon full compliance with the contract, and payment within ten days, of all unpaid installments and interest. No payments being made by the defendants, the plaintiff made demand, in writing, for the possession of the premises, which being refused she brought this action in ejectment, and for damages.

By way of their attempted equitable defense, the defendants alleged that at the time of the making of the contract the plaintiff stated that the title to the property was unencumbered, whereas it was subject to certain easements for pipe-lines; misrepresented the amount of the annual income from the place; represented the amount of land to be 32.63 acres, whereas a highway dedicated to public use required and occupied two acres; and misrepresented the real purpose for which she desired to sell the property. Defendants further averred that upon discovering the alleged falsity of these representations they demanded of the plaintiff a rescission of the contract, and that they would make no more payments thereon, but would continue to demand an immediate rescission of the contract and repayment of all sums of money paid thereunder, at the same time offering to surrender the possession of the property, together with everything received by the defendants from the plaintiff, under the terms of the agreement. This demand of rescission, and offer in connection therewith, was rejected by the plaintiff. Defendants further allege that they have at all times offered, and do now offer, and are ready and willing, upon the re-

payment to them of the amount paid to plaintiff under the contract, and any other sums that the court may find to be legally due for money expended on the property, to return to plaintiff the possession of all of said property, together with all things received from her, the said plaintiff, by these defendants under said contract. They have not done so, however, and no other reason is given for withholding possession of the land from the plaintiff.

[1] From the situation thus presented by the pleadings, it is at once seen that the defendants, vendees in possession, under a contract of purchase, not having performed their contract, and being in default with their payments, are attempting to maintain an equitable defense to an action of ejectment by the vendor. Such a defense may not be maintained. The case is very similar in its essentials to *Garvey v. Lashells*, 151 Cal. 526, wherein, at page 530, [91 Pac. 500], the court said: "So far as the defense made by the answer is concerned, the case is simply that of a vendee who has received possession of the property from the vendors under a contract of sale attempting to retain possession as against the vendors without fulfilling his covenants as to payment." As was said in another decision: "It appears to be well established that, under such circumstances, the vendee cannot retain possession of the land, while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor." (*Gervaise v. Brookins*, 156 Cal. 103, 106, [103 Pac. 329]; *Hoffman v. Remnant*, 72 Cal. 1, 4, [12 Pac. 804].) The action of the trial court in sustaining the demurrer to the amended cross-complaint, and in striking the affirmative matter from the answer, was, therefore, correct.

Appellants urged that the judgment of the trial court, restoring plaintiff to the possession of the land, without decreeing the return of the purchase price to the defendants was erroneous. There is no merit in this contention. [2] As before stated, the defendants received possession of the land from the plaintiff under the contract, and can retain possession only by fulfilling their covenants which they therein made. It was not necessary for the purposes of this case, an action in ejectment, to determine whether or not the

respondent had a good and sufficient title, or whether or not defendants had been led to enter into the contract by false representations. If they desired to retain the possession acquired under the contract, they should have complied with their part of it. If they concluded not to comply, because the title was not satisfactory to them, or for any other reason, they were bound to restore possession to the plaintiff. Whatever cause of action they may have for the purchase money which they paid and for money expended in the preservation and maintenance of the property, is another matter. It constitutes no defense to the present action. Either they must pay the purchase price, according to the contract, and receive such title as the vendor is able to give, if they choose to retain possession of the land, or, they may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the other expenditures, after deducting therefrom the fair rental value of the premises. Having refused to adopt either course, they are liable to an action of ejectment by the vendor. (*Haile v. Smith*, 128 Cal. 415, 419, [60 Pac. 1032].) The law required them to surrender possession of the property or prove an eviction therefrom, before permitting the defense of failure of consideration, or a suit to recover the purchase price, or damages. (*Rhorer v. Bila*, 83 Cal. 51, 55, [23 Pac. 274]; *Hannan v. McNickle*, 82 Cal. 122, 126, [23 Pac. 271].)

The judgment is affirmed.

Richards, J., and Gosbey, J., *pro tem.*, concurred.

[Civ. No. 3182. Second Appellate District, Division Two.—May 10, 1920.]

LOS ANGELES TRUST & SAVINGS BANK (a Corporation), Respondent, v. HERMAN BORTENSTEIN, Appellant.

- [1] **MORTGAGES — PARTIAL DESTRUCTION OF PROPERTY — JUDGMENT AGAINST TORT-FEASOR—LIABILITY FOR MORTGAGE INDEBTEDNESS.**—Where mortgaged real property is partially destroyed by the tortious act of a third party, the mortgagee, in an action to foreclose the mortgage, is entitled to have the tort-feasor, against whom a judgment has been secured by the owner, joined with the owner as a party defendant and to have included in the decree a provision that in the event the proceeds from the sale of the real property is insufficient to satisfy the mortgage indebtedness, the tort-feasor shall pay such deficiency out of the judgment obtained against it by the owner.
- [2] **ID.—AWARD OF DAMAGES TO OWNER—SUBSTITUTION FOR MORTGAGED PREMISES—EQUITY.**—In such a case, the judgment against the tort-feasor is for the injury to the mortgaged premises and, in equity, the money recovered because of such injury must be treated as the mortgaged premises, and not merely as the interest of the owner therein, notwithstanding the action against such tort-feasor is by the owner alone and the money is awarded to him.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

J. Mack Love for Appellant.

William L. Kuehn for Respondent.

**FINLAYSON, P. J.**—This is an action to foreclose a mortgage on real property. Herman Bortenstein and the city of Los Angeles are defendants. Bortenstein alone appeals from the decree of foreclosure. The chief question on the appeal is whether plaintiff has any lien, legal or equitable, upon certain moneys that, in another action, were adjudged to be due from the city to Bortenstein for injury to the mortgaged property. Bortenstein filed a demurrer to

the complaint in the present action. The demurrer was overruled, he was given ten days to answer, and, failing to answer, his default was entered. The city filed an answer admitting all the allegations of the complaint.

It appears from the complaint and recitals in the foreclosure decree that, originally, the mortgaged property, together with an adjoining strip of land ten feet wide, were owned by one Clarke and wife. The Clarkes, while the owners of the mortgaged property, mortgaged it to plaintiff to secure the payment of a promissory note for six thousand dollars executed by them to plaintiff as the payee. Thereafter the Clarkes conveyed the mortgaged property to Bortenstein, subject to the mortgage. At the same time they conveyed to Bortenstein the adjoining ten-foot strip of land. Thereafter the mortgaged property, together with the buildings thereon, and the adjoining ten-foot strip, were greatly damaged by a flood. The buildings on the mortgaged property were carried off by the flood waters and the surface of the land was washed away. Bortenstein, who had become the owner of the premises under his grant from the mortgagors, claiming that the city was responsible for the destructive effects of the flood, brought an action against the city wherein he recovered a judgment for damages. In that action Bortenstein sued not only for damage to the real property that the Clarkes had previously mortgaged to this plaintiff, but also for damage to the adjoining ten-foot strip and to certain personal property that was on the premises at the time of the flood. The judgment against the city was for the total sum of twelve thousand five hundred dollars. By its judgment in that action the court adjudged that the bare land itself, without the improvements, was damaged in the sum of one thousand five hundred dollars; that the buildings and improvements on the mortgaged property were damaged in the sum of ten thousand dollars, and that the personal property was damaged in the sum of one thousand dollars. The plaintiff here was not a party to that action. By its decree of foreclosure in the present action the trial court found that the damage to the personal property and to the ten-foot strip is 229/2500 of the total amount of damage to all the property so owned by Bortenstein, and that the damage to the property covered by plaintiff's mortgage is 2271/2500 of the total damage sustained by all the property. The



court, therefore, by its decree in this foreclosure suit, adjudged: (1) That the mortgaged premises be sold by the sheriff in the manner prescribed by law; (2) that the sheriff apply the proceeds of such sale to the payment of his fees, to plaintiff's costs of suit, and to the satisfaction of the mortgage debt; (3) that if, after such payments, there be any surplus, he pay the same to Bortenstein; and (4) that if the proceeds of such sale be insufficient to satisfy the mortgage indebtedness, then, if and when said judgment against the city shall become final, the city pay to plaintiff the amount of such deficiency out of 2271/2500 of the moneys that it had been adjudged to pay to Bortenstein; and that if the judgment for damages in the action by Bortenstein against the city should be reversed on appeal, then, out of 2271/2500 of any damages that might be awarded Bortenstein by any judgment that might thereafter become final in the action by him against the city, the latter pay plaintiff any deficiency there might be after such sheriff's sale of the mortgaged property.

[1] Appellant makes no complaint of that part of the foreclosure decree which directs a sale of the mortgaged property. His attack is against that part of the decree which gives to plaintiff the right to satisfy the mortgage indebtedness out of any moneys recoverable from the city by reason of the partial destruction of the mortgaged property. There is no merit in this contention.

If, by condemnation proceedings, the city had appropriated any part of the mortgaged property, it could not have cut off the lien of the mortgage by paying to Bortenstein, for the latter's sole use and benefit, damages for the part of the premises so appropriated. As a mortgagee, plaintiff could have claimed so much of such damages as might be necessary to satisfy the indebtedness secured by the mortgage, if the part of the mortgaged property not taken or damaged by the city should prove insufficient for that purpose. It is a well-recognized rule of equity, based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such land remains, and is to be considered, as land in respect to all rights and interests relating thereto. The money, in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance

with the legal or equitable rights of creditors or encumbrancers in respect to such land. (*Bank of Auburn v. Roberts*, 45 Barb. (N. Y.) 407; 19 R. C. L., p. 343; 88 Am. St. Rep. 363; Jones on Mortgages, sec. 708.)

In the instant case, though no part of the mortgaged property was actually appropriated by the city, the property, by reason of the city's tortious acts, was partially destroyed or extinguished. The money awarded for this injury is an equitable fund for the satisfaction of plaintiff's lien on the mortgaged property—just as much so as if it had been money paid by the city for land taken or damaged in condemnation proceedings. It is a substitute for the land, or for that part thereof destroyed or damaged by the flood.

[2] The fact that the money was awarded to Bortenstein does not change plaintiff's rights. The sum awarded to Bortenstein in his action against the city for damages arises from or grows out of the land, by reason of the injury that diminished its value. It is a fair inference from the averments of the complaint, the allegations of which are admitted by Bortenstein's default, that the damages awarded by the court in the action against the city were not limited to Bortenstein's interest, which was that of an owner of land subject to a mortgage, but covered all the damage done by the flood to the freehold. Therefore, the money so awarded by the court as damages to the realty must be treated, in equity, as the land itself. It takes the place of the reduced value of the land. The mortgaged land, in its present damaged condition, together with such portion of all the moneys awarded for the total injury as represents the damage to the mortgaged premises, stand now in the place and stead of the original uninjured mortgaged premises. (*Bank of Auburn v. Roberts*, 45 Barb. (N. Y.) 407; *Id.*, 44 N. Y. 192.)

Appellant relies confidently upon the doctrine announced in *Buckout v. Swift*, 27 Cal. 433, [87 Am. Dec. 90]. There is nothing in that case that militates against the views we have expressed. In the present case, the city caused damage to real property that Bortenstein's grantors had mortgaged to plaintiff. When the floods came the buildings on the mortgaged property were a part of the realty. The damage to the buildings, as well as to the land, was damage to the

realty. The fact that, in the action against the city for damages, the court awarded Bortenstein ten thousand dollars as and for damage to the buildings and improvements, does not detract from the fact that the damage so awarded was damage for injury to the freehold. In such cases, the measure of damages is the value of the improvement as it was in place, as a part of the realty, immediately preceding the time when it was washed away or injured by the flood; not what it would sell for in the open market as personal property after its severance from the land. (*Rhoda v. Alameda County*, 58 Cal. 357.) In the Buckout case the mortgagee was seeking to follow and impress with his mortgage lien the house that, by being severed from the land, had become personalty. Here, the mortgagee is but seeking to impress with its mortgage lien a fund that has taken the place of so much of the mortgaged realty as was destroyed by the flood.

The foreclosure decree makes no attempt to fasten upon appellant a personal liability for a deficiency judgment. The "deficiency" referred to in the decree is a deficiency that may remain after the sheriff's sale of the partially destroyed mortgaged premises. And that "deficiency," if any there may be, is to be made good out of so much of a fund as, in equity, is deemed to represent that part of the mortgaged property that was destroyed by the flood.

No other points made in the briefs require discussion. We have discussed the points upon which appellant's brief presents any argument. We find no error in the record.

Judgment affirmed.

Thomas, J., and Weller, J., concurred.

[Civ. No. 2661. Second Appellate District, Division Two.—May 10, 1920.]

**FRANK HEATH, Appellant, v. JUDSON FREIGHT FORWARDING COMPANY (a Corporation), Respondent.**

- [1] **FORWARDING AGENT—DEPOSIT OF GOODS WITH—SERVICES UNDERTAKEN—RELATION OF COMMON CARRIER.**—If goods are deposited with a forwarding agent merely as the initiatory step toward starting them in *itineris*, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in nowise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier.
- [2] **ID.—WHEN LIABILITY OF COMMON CARRIER ASSUMED.**—Where a forwarding agent undertakes to transport property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its distributing agent at the point of destination, such forwarding agent assumes, while holding the property for accumulation, the liability of a common carrier.
- [3] **ID.—RELATION TO OWNER—CARRIAGE OF GOODS TO DESTINATION—ABSENCE OF OWNER'S CONSENT.**—Irrespective of whether its relation to the owner of the shipment be that of a common carrier or a mere forwarder, a forwarding company that, for hire, undertakes the carriage of goods of another in a car of its own selection, and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to the place of destination, as contracted for, against the owner's consent.
- [4] **ID.—RIGHT OF CONTROL OVER GOODS—STOPPAGE IN TRANSIT—LIABILITY OF OWNER FOR SERVICES NECESSITATED.**—The owner does not renounce his right of all control over his goods by their delivery

1. Character as common carriers of persons or corporations other than express companies that neither own nor operate transportation routes, but undertake to transport goods, note, 42 L. E. A. (N. S.) 902.

4. Right of stoppage *in transitu*, notes, 29 Am. Dec. 384; 19 Am. Rep. 87; 1 Am. St. Rep. 312.

Right of shipper to demand a redelivery of or to divert property at intermediate point, notes, 15 L. E. A. (N. S.) 756; L. E. A. 1918B, 79.

to a common carrier or to a forwarder, but the latter stands in the relation of one employed as a bailee of goods for the purpose of obeying instructions of the owner regarding them and, subject to the payment of a reasonable charge for the services necessitated by his order, the owner has the right either to stop the goods in transit or to stop their shipment before actual transportation has commenced.

[5] **ID.—LOADING OF GOODS ON CAR—RIGHT TO REDELIVERY—EXPENSE OF UNLOADING—LIABILITY FOR—LIEN.**—Where the forwarding company has loaded the owner's goods on a car before receiving instructions to hold the shipment, but the goods, without any very great inconvenience, can be taken from the car at an expense not out of proportion to their value, the owner is entitled to a redelivery of the goods at the point of shipment, the forwarding company being allowed to charge a reasonable sum to compensate it for its trouble in taking the goods from the carload, to secure which charge it has a lien on the goods.

[6] **ID.—INSTRUCTIONS TO HOLD SHIPMENT—REFUSAL TO OBEY UNJUSTIFIED—AUTHORIZATION TO UNLOAD NOT NECESSARY.**—Where a forwarding company, after it has loaded the goods on the car but before such car has started, receives definite instructions from the owner to hold the shipment, and such goods can be taken from the car at an expense not out of proportion to their value, the forwarding company is not justified in refusing to obey such instructions because, within a time specified by it, it does not receive a reply to its telegram wherein the owner, after being advised that the goods are already loaded and the cost of unloading, is asked if he authorizes unloading.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Reversed.

The facts are stated in the opinion of the court.

W. A. Alderson for Appellant.

E. T. Sherer and Bicksler, Smith & Parke for Respondent.

**FINLAYSON, P. J.**—Defendant, a New York corporation, is engaged in the business of shipping and forwarding freight of all kinds, especially household furniture, from New York city to all points in the United States. For this purpose, defendant, at its loading station in Newark, New Jersey, assembles goods of various ownership that are to be shipped to a common destination. This is done for the

purpose of making up a carload, that thereby a through rate may be obtained that is less than the published rates of the railroad company for broken lots. The accumulated carload, so assembled for any given destination, is billed to defendant's distributing agent at the point of destination, and such distributing agent distributes the goods to the various owners at that place.

In the month of December, 1916, plaintiff, who then resided in New York, desiring to ship his household furniture to Los Angeles, which city he contemplated making his home, entered into a contract, at New York, with defendant, whereby defendant agreed to prepare plaintiff's household furniture for shipment and ship it from New York to Los Angeles. Plaintiff left the city of New York and arrived in Los Angeles about December 11, 1916. On December 18, 1916, defendant wrote a letter to plaintiff, addressed to the latter at Los Angeles, wherein defendant informed plaintiff that, owing to a freight congestion, plaintiff's household goods had not as yet arrived at the defendant's loading station at Newark.

On December 29, 1911, at Los Angeles, plaintiff, having decided to return to New York, sent to defendant, addressed to it at its New York office, a telegram reading as follows: "Hold shipment further instructions if not shipped wire my expense whether shipped or not."

This telegram was received by defendant at its New York office on December 30, 1916, at 9:30 o'clock A. M. At that time plaintiff's household furniture had been loaded on a car at Newark, but, as yet, the car had not started on its journey to California. When the car was finally loaded, the carload consisted of 124 packages, forty-three of which contained plaintiff's household furniture, the remaining packages containing goods belonging to other persons. Plaintiff's forty-three packages were the first to be loaded on the car. So that, to unload plaintiff's household furniture, it would have been necessary to unload the entire car. This would have involved an expense of about twenty dollars.

At 9:45 A. M., on December 30, 1916, which was a Saturday, defendant telegraphed from New York to plaintiff at Los Angeles as follows: "Your shipment loaded today do you authorize unloading cost about twenty dollars must have reply one o'clock New York time." It is claimed by plain-

tiff that this telegram was not actually received by him at Los Angeles until 11:55 A. M. of December 30th, which would be 2:55 P. M. at New York.

As we have said, December 30, 1916, was a Saturday. The regular time for closing defendant's office on Saturdays is 1 o'clock P. M. On this occasion, however, an employee of defendant remained at its office on December 30th until 6 o'clock to receive any telegram that plaintiff might send in reply to that sent by defendant to plaintiff at 9:45 A. M. of that day. Plaintiff did send a telegram to defendant in reply to that which, he says, was delivered to him at 11:55 A. M. That telegram, filed at Los Angeles at 11:58 A. M. of December 30th, reads: "Please unload goods and put in storage." For some reason this telegram was not delivered to defendant on December 30th. Because the next day was Sunday, and the following day, January 1st, a holiday, plaintiff's telegram of December 30th was not received by defendant until Tuesday, January 2, 1917. Upon its receipt, defendant sent plaintiff a telegram as follows: "Unfortunately your goods forwarded Saturday evening your wire not received until this morning through error or negligence of telegraph company no reply to wire Saturday afternoon. Compelled to forward car." We infer from the facts disclosed by the record that the car, loaded with plaintiff's household furniture and other shipments destined for Los Angeles, left Newark at about 6 o'clock P. M. of Saturday, December 30, 1916. On January 4, 1917, defendant wrote to plaintiff, addressed to him at Los Angeles, a letter which reads: "We beg to advise that your shipment of household goods was forwarded on Dec. 30, 1916 in a through car from Newark, N. J. consigned to our Distributing Agent: Los Angeles Warehouse Co. 316 Commercial St. Los Angeles, Calif. The charges on this shipment amount to \$270.66 which you should pay to the Distributing Agent above named, and with whom you should make arrangements for taking possession of your goods as soon as car arrives. The Distributing Agent will gladly answer any inquiries which you may wish to make relative to the matter. Usual storage charges will be assessed on goods which are not removed from Freight House within forty-eight hours after arrival."

Upon these facts the trial court found that defendant had not disregarded plaintiff's instructions, and gave judgment for defendant. From that judgment plaintiff appeals.

Respondent contends that the first telegram received by it from appellant, that filed by appellant at Los Angeles on December 29th and received by respondent on the morning of December 30th, was so uncertain that respondent was not obliged to withhold the goods from shipment. With this contention we cannot agree. We think that, regardless of any delay in the receipt by respondent of appellant's telegram of December 30th, replying to that sent to appellant by respondent at 9:45 o'clock A. M. of that day, appellant's first telegram—that filed in Los Angeles on December 29th and received by respondent at New York on December 30th at 9:30 A. M.—was alone sufficient to charge respondent with the duty of withholding appellant's goods from shipment, and that because respondent did not do so it is liable for all damages proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

It seems that respondent undertook as a forwarder to transport appellant's goods from New York to Los Angeles, as part of a carload consigned to respondent's distributing agent at Los Angeles, the shipment being handled in that way in order that respondent might obtain the benefit of the reduced rate which is made where goods are shipped in a carload lot instead of less than carload lots. We are inclined to the view that respondent's liability is that of a common carrier. [1] If goods are deposited with a forwarding agent merely as the initiatory step toward starting them *in itinere*, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in nowise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier; [2] but where, as here, the forwarding agent undertakes to transport the property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its distributing agent at the point of destination, such forwarding agent assumes, while holding the property for



accumulation, the liability of a common carrier. (*Judson Freight Forwarding Co. v. Delaware L. & W. R. Co.*, 163 Ill. App. 22; *Ingram v. American Forwarding Co.*, 162 Ill. App. 476; *Bare v. American Forwarding Co.*, 146 Ill. App. 388, affirmed in 242 Ill. 298, [89 N. E. 1021]; *Kettenhofen v. Globe Transfer & S. Co.*, 70 Wash. 645, [Ann. Cas. 1914B, 776, 42 L. R. A. (N. S.) 902, and note, 127 Pac. 295].)

However, whether respondent be treated as a forwarder or as a common carrier, we think the law is clear that it was its duty to obey any reasonable order to withhold the goods from shipment that it might receive from appellant, the owner of the property. We also are of the opinion that appellant's first telegram to defendant—filed in Los Angeles on December 29th and received by respondent at New York the next morning at 9:30 o'clock—was sufficient as a definite instruction to hold the shipment.

[3] Irrespective of whether its relation to the owner of the shipment be that of a common carrier or a mere forwarder, we are satisfied that a forwarding company that, for hire, undertakes the carriage of goods of another in a car of its own selection, and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to the place of destination, as contracted for, against the owner's consent. In this regard the obligation of the forwarder is not different from that of a common carrier; and what is said by the courts in cases against railroads and other indubitable common carriers is, we think, equally applicable to the situation presented here, whether respondent be regarded as a common carrier or as a forwarder only. Though we have found no case involving the duty of a forwarding agent to obey the owner's instructions not to ship, we think the case is controlled by the rule announced in an almost unbroken line of authorities, some of which are cited *infra*, that the true owner of goods to be transported by a common carrier retains some right of control, and, at any reasonable time before transportation has commenced, may order his goods to be withheld from shipment.

[4] The owner does not renounce his right of all control over his goods by their delivery to a common carrier or to a forwarder. The latter stands in the relation of one employed as a bailee of goods for the purpose of obeying in-

structions of the true owner regarding them. The owner's right to control the shipment is an incident of his title. The title of the carrier or forwarder, whichever it may be, is subordinate to that of the owner. Aside from its lien for lawful charges, a forwarding company cannot be allowed to defeat the owner's right to control the shipment. Subject to the payment of a reasonable charge for the services necessitated by his order, the owner has the right either to stop the goods in transit or to stop their shipment before actual transportation has commenced. (*Scothorn v. South Staffordshire R. Co.*, 8 Exch. 341; *Lewis v. Galena etc. R. Co.*, 40 Ill. 281; *Cincinnati etc. R. Co. v. Steele*, 140 Ky. 383, [140 Am. St. Rep. 388, 131 S. W. 22]; *Wente v. Chicago etc. R. Co.*, 79 Neb. 179, [15 L. R. A. (N. S.) 756, and extended note, 115 N. W. 859]; *Virginia etc. R. Co. v. Sutherland*, 138 Tenn. 266, [L. R. A. 1918B, 77, and note, 197 S. W. 863].) In *Scothorn v. Smith Staffordshire R. Co.*, *supra*, goods, intended for shipment, were marked, originally, "East India Docks, London, by Melbourne Ship to Australia." Later the shipper notified the carrier to deliver the goods at Bell Wharf, Radcliffe, London. There was a failure to comply with the request and the goods were forwarded to Melbourne and lost. In allowing the plaintiff to recover, the court said: "It is argued that that is a contract. It is no contract in one sense; it is a person taking goods to be disposed of according to the directions of another; and is it to be contended that if, an hour afterward, the owner has come back and said he wanted the goods again, the company could have said, 'No, you have made a contract for them; they shall go to the ship'! The contract with a carrier is, that he is a bailee of the owner's goods to obey his directions respecting them; and I have no hesitation in saying that, generally, at any period of the transit he may have them back; and the saying that a railroad company could carry a man's goods on against his consent is a proposition not supported either by law or common sense. It may be different when the subsequent direction to the bailee is an unreasonable one. I can conceive a case where a man may have authorized goods being put in a place where it would be very inconvenient to take them out; but, generally speaking, it is otherwise. Suppose a man travels with luggage in a railway train and becomes dissatisfied with his journey, and

says, 'I wish to go out of the train,' he has a right to do so, and take his luggage with him; but, if Mr. Gray is right, the company would be justified in saying, 'You have delivered your luggage to us, and we will take it on.' I apprehend the real circumstances of such cases as these are, that, when a man delivers his goods to a carrier, he employs him as a bailee for reward; the man may be entitled to the reward, but the owner is entitled to have the goods back if he pleases."

It doubtless is true that if the owner's goods have been put in a place where it would be very inconvenient to take them out, as, for example, if a trunk has been placed deep in the hold of a ship, under other cargo, and the ship is about to sail, so that taking the trunk out would delay the vessel's sailing and thus involve an expense out of all proportion to the value of the trunk and its contents, the owner would not have the right to redelivery of his trunk at the port of departure. [5] But here appellant's goods, without any very great inconvenience, could have been taken from the car at an expense not to exceed twenty dollars—an expense not out of proportion to the value of the articles. For its services in taking his property from the carload, in obedience to appellant's instructions, respondent would not be allowed to charge more than a reasonable sum to compensate it for its trouble. Had it obeyed appellant's instructions, the law would have implied an agreement on the latter's part to pay a reasonable charge for the unloading. (*Carr v. Pennsylvania Ry. Co.*, 92 N. Y. Supp. 799.) To secure such charge, respondent would have had a lien on the goods. (Civ. Code, secs. 1856, 2144.)

[6] The telegram upon which appellant must rest his case, the telegram filed in Los Angeles on December 29th and received by respondent on the morning of December 30th, was not punctuated. We quote it again: "Hold shipment further instructions if not shipped wire my expense whether shipped or not." Respondent says that this telegram, by different punctuations, can be interpreted in at least four different ways. This may be so. But regardless of how punctuated, or how interpreted, the telegram always contains the definite instruction, "Hold shipment." It may be that the telegram should be read as directing respondent to hold appellant's shipment until further instructions were

received, or to hold the shipment if the goods had not already been shipped. The goods had not been shipped, and, under any interpretation, respondent is definitely directed to "hold shipment." This it did not do. Having received a definite instruction to "hold shipment," respondent could not justify its course merely because it did not receive, until January 2, 1917, a reply to its telegram of December 30th, asking appellant if he "authorized unloading," and notifying him that the unloading would cost about twenty dollars.

It is claimed that respondent could not be required to unload appellant's household furniture in order to "hold shipment," unless appellant entered into a new contract with respondent to pay the latter for unloading the car, which, according to respondent's telegram of December 30th, would amount to about twenty dollars. This insistence overlooks the fact that the owner's right to control the goods, and, if he pleases, to stop the shipment and direct and receive a redelivery of the goods, is, by law, implied in the shipment contract itself as a part thereof (*Virginia & Southwestern R. Co. v. Sutherland, supra*); and further, that the law implies an agreement by the owner to pay a reasonable charge for any extra services that may be necessitated by his exercise of the right thus to control the shipment.

There is no merit in the contention that appellant himself could have stopped the goods before their arrival at Los Angeles. It appears from respondent's letter of January 4, 1917, that the goods were consigned by respondent, as consignor, to itself, or to its distributing agent at Los Angeles, as consignee. Appellant, therefore, could have done nothing save through respondent.

Finally, it is contended that appellant cannot recover because he did not present a claim for his damages within thirty days. This contention is based upon a clause in the receipt that respondent gave the warehouseman from whom it received appellant's goods. That clause reads: "... Claim for any loss or damage must be presented within thirty (30) days from date of arrival of shipment at destination. All particulars and proof of loss or damage required by Railroad Companies or other Transportation Agency to be furnished by the claimant. If goods are placed in storage,

claim, if any, must be made before storing." The "claim" referred to in this clause of the receipt is a claim for loss or damage, while the goods are in transit, due to some fault of the railroad company. The clause was not intended to cover a claim for damages due to respondent's own dereliction.

The judgment is reversed.

Thomas, J., and Weller, J., concurred.

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[Civ. No. 2795. Second Appellate District, Division One.—May 11, 1920.]

JOHN H. UPLINGER, Respondent, v. HENRY II. YONKIN, Appellant.

[1] FOREIGN JUDGMENTS—ACTION ON—EVIDENCE.—In an action upon a foreign judgment, an authenticated copy of the judgment alone, without the judgment-roll, is properly received in evidence.

[2] *Id.*—PERSONAL SERVICE OF SUMMONS—RECITAL IN JUDGMENT—PRESUMPTION.—In view of the provision of the constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings of every other state, and of the presumption contained in subdivision 16 of section 1963 of the Code of Civil Procedure, it will be presumed that the court had jurisdiction to render such judgment, where it is authenticated by a certificate reciting that said court is a court of record, having a seal, and the judgment itself recites "that due personal service of process of summons issued in said cause has been had on the defendant."

TRIALS—NOTICE OF HEARING—DEFAULTING DEFENDANT.—The notice of time of hearing of an action, as provided by section 594 of the Code of Civil Procedure, need not be given to a defaulting defendant.

[4] *Id.*—FAILURE TO GIVE NOTICE—JURISDICTION TO ENTER JUDGMENT. In those cases where the requirements of section 594 of the Code of Civil Procedure are applicable, a trial and judgment given without such notice is merely erroneous and is not in excess of the court's jurisdiction.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

Haas & Dunnigan for Appellant.

James R. Jaffray for Respondent.

CONREY, P. J.—Action to recover judgment for money due upon a judgment entered against the defendant in the circuit court of DeKalb County, Illinois. Judgment was entered herein against the defendant, who now appeals therefrom. Appellant presents three points, on which he claims that this judgment should be reversed.

[1] First point: That the Illinois judgment has not been proved as required by law, in this, that an authenticated copy of the judgment alone was received in evidence, without the judgment-roll. This question has been determined adversely to appellant's contention in *McHatton v. Rhodes*, 143 Cal. 275, [101 Am. St. Rep. 125, 76 Pac. 1036]. An issue presented in that case depended upon the validity of a judgment of a circuit court, a court of general jurisdiction in the state of Missouri. An authenticated copy of the Missouri judgment was admitted in evidence, without the judgment-roll. The judgment of the superior court was affirmed, notwithstanding that the decision therein contained was clearly wrong unless supported by the evidence of the foreign judgment.

[2] Second point: That the judgment sued on is invalid as the basis of a recovery thereon in California, inasmuch as the judgment itself does not show that personal service of the summons in said action was had upon the defendant in the state of Illinois and within the jurisdiction of the court rendering said judgment, and there is not any other proof, by way of record or otherwise, offered in support of such jurisdiction. The judgment, as shown by the copy thereof, duly certified under seal of court and authenticated, states that "it appearing to the court that due personal service of process of summons issued in said cause has been had on the defendant for at least ten days before the first day of this term and he being now here three times solemnly called in open court comes not nor does any person for him, but herein he makes default which is on motion of plaintiff's attorney ordered to be taken and the same is hereby entered of record." Thereupon, it is stated, evidence was received, the damages were assessed, and recovery had in the sum

specified. The certificate recites that said court is a court of record, having a seal. This is sufficient to establish *prima facie* that it is a court of general jurisdiction. In *McHatton v. Rhodes, supra*, the Missouri judgment was a judgment determining adversely to one Hattie Meagher her claim of title to certain real property. The recitals contained in the judgment were to the effect that she had been duly notified by publication. The supreme court of California held that in that case, "the court being of general jurisdiction, all presumptions are that it had jurisdiction, and that the effect of the recital in the judgment is that the notice or summons was properly published. It is declared in the constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings of every other state." The court referred to section 1963, subd. 16, of the Code of Civil Procedure, and after some further discussion, said: "In all cases where a judgment is collaterally attacked we must presume, in the absence of anything appearing to the contrary, that they were properly brought in. The presumption is the same where service has been made by publication as where personal service has been had."

[3] Third point: That the record does not show that any notice of the time of the hearing of said action was ever served upon or had by the defendant, or served upon or had by any attorney for defendant, and no evidence other than the so-called judgment was offered in that regard. This contention is based upon the provisions of section 594 of the Code of Civil Procedure of California, and the presumption (in the absence of other evidence) that the law of Illinois, as to the requirement of notice of the time of trial, is the same as the law of California. But the notice provided for need not be given to a defaulting defendant.

[4] And even where the requirements of the section are applicable, a trial and judgment given without such notice is merely erroneous and is not in excess of the court's jurisdiction; such, at least, is our inference from the only decision which seems to have touched the question. For in that decision (*Estate of Dean*, 149 Cal. 492, [87 Pac. 13]), the court very carefully limited to cases of direct appeal its declaration that a judgment rendered in disregard of that section is erroneous and should be reversed.

We are of the opinion that the court did not err in receiving the evidence to which reference has been made, or in rendering judgment against appellant on the facts as thus proved.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

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[Civ. No. 2806. Second Appellate District, Division One.—May 11, 1920.]

CREDIT GUIDE COMPANY (a Corporation), Respondent,  
v. FIDELITY STORAGE AND MOVING COM-  
PANY (a Corporation), Appellant.

[1] CLAIM AND DELIVERY—STATUTE OF LIMITATIONS—EVIDENCE—UNSUPPORTED FINDING.—In this action to recover possession of certain described personal property or the value thereof, the evidence was insufficient to sustain the court's finding that the cause of action was not barred by the provisions of the third subdivision of section 338 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Los Angeles County. S. M. Marsh, Judge presiding. Reversed.

The facts are stated in the opinion of the court.

Frederick A. Preston for Appellant.

D. Joseph Coyne for Respondent.

CONREY, P. J.—Action to recover possession of certain described personal property or the value thereof. Judgment entered in favor of the plaintiff, from which the defendant appeals.

[1] In the answer it was alleged that the action is barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure, under which an action of this character must be commenced within three years from the time when the cause of action accrued. The property in



question belonged to plaintiff's assignor, Sarah B. Clark, and came into the possession of the defendant in December, 1912, or January, 1913. Mrs. Clark testified as follows: "I have requested and demanded the return of the goods which were missing on a number of occasions, as follows: at Los Angeles, one or two times at defendant's place of business, the loss of the box having been discovered in April, 1913; I demanded the same several months later; I was at that time advised that they could not locate the box or the contents, but that they said that they would continue their efforts; several times after the occasion mentioned, I took up the matter with the company and was again advised that they were still searching for the chest containing the articles mentioned but had not yet been successful." In connection with the testimony of Mrs. Clark, it appears that her demand had been made and was being insisted upon by her as early as January, 1914. On the 8th of that month defendant sent her a letter, stating that defendant was endeavoring to find the chest in which said goods were said to be contained, and asked her for a description of the chest and contents; on the 29th of the same month they sent her a second letter, acknowledging receipt of a letter from her of date January 19th giving the contents of the chest, and stating that they were moving the contents of their old warehouse into their new one, and "we are in hopes to find your chest in this way; if we do not, we will endeavor to make a settlement with you." This is practically all of the evidence bearing upon the time when the demand was made and when the claimant's right of action accrued. The action was not commenced until April 24, 1917. On these facts it seems to be established without any doubt that the evidence is insufficient to sustain the court's finding that the cause of action is not barred by the provisions of the third subdivision of section 338 of the Code of Civil Procedure.

The judgment is reversed.

Shaw, J., and James, J., concurred.

[Civ. No. 3362. First Appellate District, Division Two.—May 11, 1920.]

**FREDERICK A. SCHMIDT, Appellant, v. HENRY PURSELL et al., Respondents.**

- [1] **WORKMEN'S COMPENSATION ACT—GENERAL ORDERS OF COMMISSION—EVIDENCE—JUDICIAL NOTICE.**—Courts cannot take judicial notice of a general order of the Industrial Accident Commission.
- [2] **ID.—FAILURE TO COMPLY WITH ORDERS—WANT OF NOTICE—NEGLIGENCE.**—Failure of an employer to comply with some general order of the Industrial Accident Commission of which he had no notice would not constitute gross negligence.
- [3] **ID.—REASONABLENESS OF ORDERS—PRESUMPTION—WHEN APPLICABLE.**—The conclusive presumption, prescribed by section 66 of the Workmen's Compensation, Insurance and Safety Act, that every order of the commission is reasonable and fixes reasonable and proper standards and requirements for safety, does not apply to an action for damages instituted by an employee under section 12 (b) of the act.
- [4] **ID.—WHEN ORDERS EFFECTIVE.**—Under section 59 of the Workmen's Compensation, Insurance and Safety Act, orders of the commission do not become effective until served upon the employer.
- [5] **ID.—ACTION FOR DAMAGES—REASONABLENESS OF ORDERS—ISSUE OF NEGLIGENCE—PROPER FINDINGS.**—In an action for damages instituted by an employee against the employer under section 12(b) of the Workmen's Compensation, Insurance and Safety Act, the reasonableness of the orders of the commission (the violation of which plaintiff relied on to prove gross negligence on the part of the defendant), having been directly put in issue by the allegations of the complaint, and the court having found in effect that such orders were unreasonable, a finding upon the issue of gross negligence and willful disregard of the safety of the employee is proper.
- [6] **ID.—WAIVER OF COMPENSATION UNDER ACT—GROSS NEGLIGENCE—BURDEN OF PROOF.**—In such an action, the plaintiff having waived his right to compensation afforded him by the act and chosen to proceed in such action at law for damages, it is incumbent upon him to prove that the injury resulted both from the gross negligence (or willful misconduct) of the defendant and from the willful disregard of the life, limb, or bodily safety of plaintiff.

6. Right to, and effect of, election with respect to acceptance of provisions of Workmen's Compensation Act, notes, *Ann. Cas.* 1915C, 308; *Ann. Cas.* 1918A, 700; *Ann. Cas.* 1918B, 715.

- [7] **ID.—WILLFUL DISREGARD OF SAFETY OF EMPLOYEE — WHAT CONSTITUTES.**—To willfully disregard the safety of an employee is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. L. H. Valentine, Judge. Affirmed.

The facts are stated in the opinion of the court.

Warren L. Williams for Appellant.

Duke Stone for Respondents.

**NOURSE, J.**—Plaintiff appeals from a judgment in favor of defendants in an action for damages for personal injuries sustained by plaintiff while in the employ of the defendants. Plaintiff chose to avail himself of section 12 (b) of the Workmen's Compensation, Insurance and Safety Act, as amended in 1915 (Stats. 1915, p. 1081), and effective at the time of the injury and waived compensation under the act. Section 12 then provided that, when conditions of compensation existed, the right to recover pursuant to the provisions of the act should be the exclusive remedy against the employer "except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury . . . indicated a willful disregard of the life, limb or bodily safety of employees, any such injured employee may, at his option, either claim compensation under this act or maintain an action at law for damages." The complaint alleged that the accident was the result of the gross negligence of the defendants in failing to properly equip a jointer machine upon which plaintiff was employed with the necessary safety appliances, and also that it was the result of the willful disregard of the life, limb, and bodily safety of the plaintiff on the part of said defendants in refusing and neglecting to equip said machine with such safety appliances. It was also alleged that the cylinder head and guard was a necessary equipment and part of said machine to prevent the operator thereof from coming in contact with the knife and mangle. These allegations were all denied by the an-

swer, and the court found that the defendants were not guilty of gross negligence nor of a willful disregard of the life, limb, or bodily safety of the plaintiff in refusing to equip said machine with such safety appliances, and also that such safety appliances were not at the time a necessary equipment to prevent the operator thereof from coming in contact with the knife or mangle of the machine. It was also found, in accordance with the allegations of the answer, that plaintiff was thoroughly familiar with the workings and the danger incident to the use of the machine. The appeal is confined solely to an attack upon that portion of the findings which negative gross negligence on the part of the defendants.

The facts material to the opinion are that plaintiff had been in the employ of defendants for some five months prior to the accident and had become thoroughly familiar with the machine upon which he received the injury. He was an experienced operator and had worked for many years on machines of this nature, some of which had guards or safety devices, others had not. On July 20, 1917, five days prior to the date of the injury, an employee of the Industrial Accident Commission notified defendants that the machine should be equipped with a safety device, and acting upon such notice the defendants placed an order for such equipment, which, however, had not been received at the time of the injury. In this connection one of the defendants testified that they had not been notified prior to the 20th of July to equip the machine with a safety device and that it was impossible to obtain one within the five days.

The theory of appellant is, that the failure of respondents to comply with the general order of the Industrial Accident Commission relating to the equipment of similar machines with safety devices, after having been personally instructed so to do in this instance by one of the employees of the commission, constitutes gross negligence entitling appellant to recover in this case. The argument in this connection is based upon a misunderstanding of the record, in that the record fails to disclose that any general order of the Industrial Accident Commission was offered or received in evidence. [1] In the briefs it is argued that a certain general order of the commission required the equipment of similar machines with cylindrical cutter heads, but this

order was not offered in evidence and, though it may have been referred to in argument before the trial judge, it is not such a matter as can be given judicial notice. Thus the argument of appellant resolves itself into this, that the failure of defendants to equip the machine with safety devices immediately upon the direction of the employee of the Industrial Accident Commission constitutes gross negligence on their part. In his opening brief it is said: "We would not be understood as insinuating that violation of the statute in itself constituted 'gross negligence.' That is not our position here."

[2] If the violation of a statute in itself does not constitute gross negligence (and there is respectable authority to that effect, though in reserving decision upon that point in an order denying a hearing after judgment in the district court of appeal of the second district in *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, [185 Pac. 510], our supreme court has cast some doubt upon the extent of the rule in this state), surely the failure to comply with some general safety order of the Industrial Accident Commission of which the employer may have had no notice would not constitute gross negligence. [3] Section 66 of the act, [Stats. 1913, p. 309], as in effect at the time of the injury, provided that every order of the commission should be admissible as evidence in any prosecution for the violation of certain provisions of the act, and that in every such prosecution they should be conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety. But by this section the orders are conclusively presumed to be reasonable only in prosecutions for violations of the act. The presumption does not apply to an action for damages instituted by an employee under section 12 (b). [4] Furthermore, these orders do not become effective until served upon the employer. (Sec. 59.) The record discloses that no service was made of any order upon defendants other than the oral instruction given to them by an employee of the Industrial Accident Commission on July 20th. [5] As to this instruction it does not appear what time was given the employers to comply, and the reasonableness of the order having been directly put in issue by the allegations of the complaint of the necessity of equipping the machine with a

certain safety device, and the court having found that such was not necessary, it must follow that the finding of the court upon the issue of gross negligence and willful disregard of the safety of the employee was proper and that any other finding under the circumstances would have had no support in the evidence.

[6] Furthermore, appellant having waived his right to compensation afforded him by the Workmen's Compensation, Insurance and Safety Act and chosen to proceed in this action at law for damages, it was incumbent upon him to prove that the injury resulted both from the gross negligence (or willful misconduct) of respondents *and* from the willful disregard of the life, limb, or bodily safety of appellant. [7] The willful disregard of the safety of an employee means something more than mere negligence or carelessness. To willfully disregard the safety of an employee is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge. The trial court found that respondents did not know that the machine was dangerous to operate without a safety device, and this finding is not attacked. Such being the case, the willful disregard of life, limb, or bodily safety, which is a necessary element to recovery in an action of this nature, was not shown.

The judgment is affirmed.

Brittain, J., and Langdon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 8, 1920.

All the Justices concurred, except Wilbur, J., and Lannon, J., who were absent.

[Civ. No. 3328. First Appellate District, Division One.—May 11, 1920.]

**FRANK R. SCHWARZ, Respondent, v. FREDERICK H. BOHLE et al., Appellants.**

- [1] **QUIETING TITLE—ACTION AGAINST ADMINISTRATOR—SCOPE OF JUDGMENT—PARTIES.**—A judgment entered in favor of the plaintiff in an action to quiet title against the administrator of the estate of a deceased person is binding upon her estate, and is binding and conclusive as against the heirs of said deceased, even though they are not made parties defendants.
- [2] **ID.—DISCLAIMER BY DAUGHTER—ABSENCE OF INTEREST—WANT OF CONSIDERATION.**—The trial court, in such action, having determined that the property in question was the community property of the plaintiff and his deceased wife, and hence passed to him solely and absolutely upon her death, and that the daughter of such deceased wife never had any interest whatever in said property, the disclaimer by such daughter of any interest in the property, she having been made a party defendant, could furnish no consideration for an oral promise by plaintiff to deed her the premises upon demand.
- [3] **STATUTE OF FRAUDS—ORAL PROMISE TO CONVEY PROPERTY.**—An oral promise to convey property upon demand is void under section 1624 of the Civil Code, in the absence of elements of fraudulent conduct taking the case outside of the requirements of said statute.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Theodore L. Breslau and Harold C. Faulkner for Appellants.

McPike & Murray for Respondent.

**RICHARDS, J.**—This action was instituted by the plaintiff to recover possession of the premises involved in it from the defendants, who were alleged to be tenants of the plaintiff and to have failed to pay their rent, and also failed and refused to surrender possession of the premises to the plain-

tiff as the owner thereof. The answer of the defendants denied their relation as tenants of the plaintiff and denied that the plaintiff was the owner of the premises. As a further answer to the plaintiff's complaint the defendants alleged that one Julia Schwarz, deceased, the wife of the plaintiff, and the mother of the defendant Eva Anna Bohle, was in her lifetime the owner of the premises in question; that she died intestate, and that after her death the plaintiff in this action represented to the said defendant Eva Anna Bohle that if she would disclaim to him all interest in the property he would clear the title, and would thereafter on demand grant said premises to said Eva Anna Bohle; and that relying on such representations she disclaimed all her right, title and interest in said property to said plaintiff, but that said plaintiff upon her demand has refused to convey said property to her; wherefore she prays that she be adjudged the owner of said property; and that the plaintiff be required to deed the same to her.

Upon the trial of the cause the plaintiff testified that the property in question was purchased by himself and his said wife, Julia Schwartz, as community property; that upon her death an administrator was appointed of her estate; that the plaintiff thereupon commenced an action against said administrator and also against the two children of himself and his deceased wife, of whom Eva Bohle was one, to quiet title to the premises, alleging the same to have been community property, and that he since his wife's death was the sole and absolute owner thereof. The administrator filed a general denial in said action; the other two defendants filed disclaimers therein. Upon the trial of that action the plaintiff recovered judgment, decreeing him to be the sole owner of the property. The judgment-roll in that case was then introduced in evidence in this case, and the plaintiff rested. Thereupon the defendants undertook to offer evidence in support of the affirmative averments of their answer to the effect that the plaintiff had orally promised the defendant herein, Eva Anna Bohle, that if she would give him a disclaimer in the former suit he would convey the premises to her upon demand. The court refused to permit the defendants to make this proof upon the two grounds that if it was offered as an attack upon the former judgment it was inadmissible since that judgment was *res adjudicata* between



the parties to this action; and if, on the other hand, it was offered by the defendant in an effort to establish an oral trust in the plaintiff to convey the premises to the said defendant Eva Anna Bohle their pleadings were wholly insufficient to permit oral proof of such trust. The court thereupon rendered its judgment in the plaintiff's favor, and from such judgment the defendants prosecute this appeal.

[1] We are satisfied that the trial court committed no error in its aforesaid rulings upon the trial of this cause. The judgment entered in the former action to quiet title against the administrator of the estate of Julia Schwarz, deceased, was, of course, binding upon her estate, and would have been binding and conclusive as against the heirs of said deceased even if they had not been parties to and have filed disclaimers in said action. (*Cunningham v. Ashley*, 45 Cal. 485; *McCaughy v. Lyall*, 152 Cal. 615, [92 Pac. 681].) It would, therefore, have been *res adjudicata* against these defendants if they had undertaken in this action to attack the same.

[2] But the defendants, by their affirmative pleading in this case, make no attack upon said judgment, and in fact in their briefs herein expressly disclaim any intent to assail said judgment. The defendants' sole contention, as disclosed by their said pleading, is that the plaintiff received from Eva Anna Bohle a disclaimer of any interest in said premises derived from her deceased mother upon his oral promise to thereafter deed said premises to her, and that he has refused to make said deed. There are no averments of actual fraud in this pleading, nor is there the slightest attempt to bring this case as to its pleadings within the case of *Brison v. Brison*, 75 Cal. 525, [7 Am. St. Rep. 189, 17 Pac. 689], and the later cases approving its doctrine as to constructive fraud. The utmost that can be said of the defendants' case, as presented both in their said pleading and in their proposed proofs, is that they are attempting to enforce an oral agreement to convey real estate. There are several insuperable obstacles in the way of the defendants' success. The judgment in the former case decreed that the property in question in both cases was the community property of the plaintiff and his deceased wife, and hence passed to him solely and absolutely upon her death. The defend-

ants, as we have seen, are bound by that judgment, and in fact do not assail it. It was thus conclusively determined that the defendant herein Eva Anna Bohle never had any interest whatever in said property. Her disclaimer, therefore, could furnish no consideration for the plaintiff's oral promise to deed her the premises upon demand, and it was therefore such a promise which, even if made, equity would not enforce. [3] The provisions of section 1624 of the Civil Code embracing the statute of frauds is another insurmountable barrier to the defendants' recovery in this action in the absence of those elements of fraudulent conduct on the plaintiff's part taking the case outside of the requirements of said statute. The trial court properly ruled that the defendants had presented no such case in their pleadings as would permit them to make their proffered proofs. The judgment is therefore affirmed.

Waste, P. J., and Knight, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 10, 1920, a majority of the Justices not having expressed their consent to the granting thereof.

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[Civ. No. 2848. Second Appellate District, Division One.—May 11, 1920.]

J. H. STONE, Respondent, v. PORTER-BURNHAM COMPANY (a Corporation), Appellant.

[1] CONTRACTS—SALE OF POTATOES—ACTION FOR UNPAID BALANCE—EXECUTION OF NEW AGREEMENT—EVIDENCE—FINDING.—In this action brought to recover the unpaid balance of money due for a crop of potatoes sold and delivered by plaintiff to defendant, the evidence was sufficient to support the finding of the trial court that, after the original contract in which defendant agreed to pay a given price per pound was entered into, plaintiff and defendant did not enter into a new agreement whereby the first contract was rescinded and a new agreement of sale made at a reduced price, and that defendant did not receive the potatoes pursuant to such a new agreement.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. H. Morris for Appellant.

W. A. McGinn and Wm. B. Beazley for Respondent.

CONREY, P. J.—Pursuant to the terms of a written contract the plaintiff delivered to the defendant a crop of potatoes for which the defendant agreed to pay at the rate of two cents per pound. This action was brought to recover the unpaid balance of money due for the merchandise so delivered. Judgment was entered in favor of the plaintiff for the amount demanded, and the defendant appeals from that judgment.

[1] The answer of the defendant alleged that prior to the delivery of any of the potatoes it was learned that the potatoes were not of the quality specified in the written contract; that thereupon a new agreement was entered into whereby the first contract was rescinded and a new agreement of sale was made at the reduced price of \$1.75 per hundred pounds; that pursuant to said new agreement the defendant received the potatoes thereafter delivered to it.

The court found against the defendant on the affirmative defense thus presented. The only question presented on this appeal arises upon the contention of appellant that this finding of the court was not sustained by the evidence. The writing alleged to constitute the new agreement was received in evidence in connection with the testimony of the defendant's agent, who testified that it was signed by the plaintiff in the presence of said agent and that he delivered to the plaintiff a copy thereof. This was a receipt for money paid, with data indicating the \$1.75 rate. The plaintiff would not admit that the signature to such paper was his signature, but did admit that it looked like his signature. On the other hand, he testified that the only paper which he did sign was merely a receipt for money, which did not contain the same figures contained in the document presented in evidence by the defendant; particularly that it did not contain any reference to the \$1.75 price to be paid, and that

he did not receive any copy of the paper signed by him. Defendant's agent testified to the facts alleged in the affirmative defense to the effect that the plaintiff had agreed with him for a rescission of the original written contract and for a new sale at the reduced rate of \$1.75 per hundred pounds. The plaintiff denied that such conversation ever occurred, and denied that he had signed any writing providing for such reduced rate. The testimony of the plaintiff as to these matters was corroborated by the testimony of disinterested persons who testified that defendant's agent had told them on the same day as the date found on said alleged new agreement, that defendant was paying the plaintiff for his crop of potatoes at the rate of two cents per pound, and that now he would not pay more than \$1.75 for the potatoes of said witnesses because the market price had gone down. Without further outlining the evidence, enough has been said to show that the evidence is sufficient to support the finding of fact as made by the court.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

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[Civ. No. 3253. Second Appellate District, Division One.—May 11, 1920.]

GEORGE BENNETT, Respondent, v. FIRST NATIONAL BANK OF HOLLYWOOD (a Corporation), Appellant.

- [1] **BANKS AND BANKING—FORGED INDORSEMENT OF CHECK—PAYMENT BY BANK—LIABILITY TO DEPOSITOR.**—A bank has no right to charge a depositor's account with the amount of a check upon the forged indorsement of the name of the payee.
- [2] **ID.—LOAN ON FORGED NOTE AND MORTGAGE—LIABILITY TO REPAY LENDER.**—Where a person falsely represents himself to be the agent of the owner of certain real property and that such owner desires a loan of a given amount to be secured by a mortgage upon such property, and, upon the production of a note and mortgage purporting to be executed by such owner, both of which documents are in fact forged instruments, a loan is made, the lender, by delivering to the purported agent a check payable to his order,

which the latter in due course cashes, creates only a personal liability on the part of the latter to repay the same.

- [3] **ID.—PAYMENTS BY FORGER TO DEPOSITOR—RIGHT OF BANK TO CREDIT.**—In an action against a bank to recover a sum which it charged to plaintiff's account upon the payment by it of a check drawn by plaintiff on it upon a forged indorsement of the name of the payee, the bank is not entitled to have applied in liquidation of its liability to plaintiff the amount paid by the person who committed the forgery to plaintiff in settlement of a personal liability, where the funds used in making such payment were derived from a source other than the proceeds of forged check.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Affirmed.

The facts are stated in the opinion of the court.

Evans, Abbott & Pearce and W. E. Evans for Appellant.

Howard F. Shepherd for Respondent.

**SHAW, J.**—This action was brought by plaintiff against the First National Bank of Hollywood to recover the sum of one thousand dollars, which the bank charged to his account because of the payment of a check drawn by him thereon and upon which the name of the payee was forged.

Judgment went for plaintiff, from which the defendant appeals upon the judgment-roll.

As appears from the findings, the facts are as follows: In August, 1917, one S. W. Thomas, then a man of good repute and president of the Garvanza Investment Company, falsely represented to plaintiff that he was the agent of Abbie Gilbert (who was in fact a real person), and that she desired a loan of two thousand dollars, to be secured by mortgage upon certain real estate owned by her. Plaintiff agreed to make the loan and some days thereafter Thomas delivered to him a note and mortgage purporting to be executed by Gilbert, both of which documents were in fact forged instruments. Thereupon plaintiff delivered to Thomas a check for one thousand dollars, drawn upon defendant

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8. Forger's application of proceeds of check to an indebtedness to depositor, as affecting bank's right to charge the same against depositor's account, note, 25 L. E. A. (N. S.) 996.

bank and payable to the order of Abbie Gilbert, whose name Thomas, without her consent or knowledge, indorsed thereon and deposited it in the First National Bank of Glendale to the credit of the Garvanza Investment Company, the account of which he used for his own purposes, and which check, upon being presented to defendant, was paid in due course on August 22, 1917. Thereafter, to wit, on August 27, 1917, in advancing the balance due upon said purported loan, plaintiff gave his check upon defendant bank for one thousand dollars, payable to the order of S. W. Thomas, who duly indorsed the same, which defendant paid to the account of said Garvanza Investment Company upon presentation, likewise charging the same to plaintiff's account. Prior to the time when the Garvanza Investment Company received the proceeds of the Thomas check, all the money represented by the Gilbert check was by it checked out and paid to persons not here concerned. While Thomas, between September 4, 1917, and April 5, 1918, paid plaintiff in installments the sum of one thousand dollars, which sums were credited generally upon the forged note of Abbie Gilbert, no part thereof was from the proceeds of the Gilbert check. Neither Abbie Gilbert nor the parties hereto learned of the fraudulent nature of the transactions until September, 1918, at which time plaintiff demanded payment from defendant of his one thousand dollars so paid out on the Gilbert check. The court further found that plaintiff was not guilty of any negligence which contributed to the action of defendant in making said payment, and that the payment of one thousand dollars made by Thomas on said purported note of Gilbert "was not made at the expense of or to the injury of defendant, and that plaintiff was not (thereby) benefited beyond his total loss."

Upon these findings appellant attacks the court's conclusion of law based thereon, "that plaintiff had a right to apply the whole sum of one thousand dollars paid by S. W. Thomas to plaintiff on account of the said note and mortgage in liquidation of the said check of one thousand dollars made and delivered by plaintiff to said S. W. Thomas on the twenty-seventh day of August, 1917, and to apply no part of the same on the said check of one thousand dollars payable to said Abbie Gilbert."

Defendant's unauthorized act in paying the Gilbert check upon which the indorsement was forged is conceded by appellant (*Redington v. Woods*, 45 Cal. 406, [13 Am. Rep. 190]), who, however, insists that defendant should have the benefit of the one thousand dollars paid by Thomas in liquidation of any damage sustained by plaintiff on account of such unauthorized action on its part.

[1] That defendant had no right to charge plaintiff's account with the one thousand dollars so paid out upon the forged indorsement of the Gilbert check is not open to controversy, but in fact conceded by appellant, which, however, insists that equitably it is entitled to have the one thousand dollars paid plaintiff by Thomas applied in liquidation of its liability, and hence, if so applied, defendant has been reimbursed for the loss sustained by its unwarranted act. Its argument in support of this contention is predicated chiefly upon the claim that the loss was due to plaintiff's negligence, which, in the absence of the evidence, is fully answered by the finding of the court that defendant's action was not due to any negligence on the part of plaintiff.

The action is not based upon the fraud practiced by Thomas upon plaintiff. That is no concern of defendant. [2] It is true that plaintiff, for some reason not appearing, delivered to Thomas a check payable to his order for one thousand dollars, which Thomas in due course cashed; but such act (whatever plaintiff's intention, since the Gilbert note was a nullity), created a personal liability on the part of Thomas, who was the only person answerable therefor, and if not paid, an action for recovery would lie against him alone. The payment of any judgment obtained thereon could not be deemed the liquidation of defendant's liability to plaintiff in paying the Gilbert check. [3] If this argument is sound, it follows that the situation is not changed by the fact that Thomas, without a judgment therefor, and from funds other than the proceeds of the Gilbert check (*Andrews v. Northwestern Nat. Bank*, 107 Minn. 196, [25 L. R. A. (N. S.) 996, 117 N. W. 621, 122 N. W. 499]; *Shipman v. Bank of State*, 126 N. Y. 318, [22 Am. St. Rep. 821, 12 L. R. A. 791, 27 N. E. 371]), paid to the plaintiff the sum so received by him, and for which he alone was liable. As found by the trial court, the payment was not made at the expense or to the injury of the defendant. The

payment was not made out of any fund belonging to it, nor as to the loss due to defendant's action, was plaintiff benefited by the payment. No equitable reason occurs to us why the sum paid by Thomas should be applied in liquidation of defendant's liability to plaintiff, from which it follows that defendant still has one thousand dollars of plaintiff's money.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

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[Civ. No. 3200. Second Appellate District, Division Two.—May 12, 1920.]

EMMET McCONNELL, Appellant, v. ESTATE OF JAS. H. GAUT, Deceased, et al., Respondents.

[1] HUSBAND AND WIFE—RATIFICATION OF HUSBAND'S ACTS—AGENCY—EVIDENCE.—The act of the wife in merely signing her name to certain documents affecting the title to real property standing in her husband's name, to facilitate his business, cannot be held to constitute a ratification by her of all previous acts of her husband in his own behalf, as having been done by him as her agent; neither can the fact that on previous occasions the husband had procured his wife's signature to notes, and that she had thereby become personally obligated thereon, of itself operate to constitute him her agent for all time and for all purposes, so as to render her personally bound by his acts.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

Simpson & Simpson for Appellant.

J. H. Merriam for Respondents.

WELLER, J.—This action was brought to recover judgment against Helen Lukens Gaut, as administratrix of the estate of Jas. H. Gaut, deceased, and in her individual capa-



city, in the sum of \$6,700, on account of certain moneys alleged to have been loaned by plaintiff to the decedent and his wife, the said Helen Lukens Gaut. The court below rendered judgment against the administratrix for the amount prayed, but denied relief as against her individually. From the latter portion of the judgment plaintiff appeals.

The following facts are shown by the findings: On December 15, 1913, the decedent, Jas. H. Gaut, was the owner of certain real property in Riverside County, subject to five encumbrances, aggregating \$15,300, one, a mortgage in the sum of \$6,000, signed by Gaut and wife, being held by plaintiff. On or about that date plaintiff and Jas. H. Gaut entered into a contract whereby they agreed that the property should be cleared of the encumbrances, that plaintiff would loan Gaut \$6,700, that the latter should execute to plaintiff two promissory notes, each for \$6,350, secure their payment by a mortgage upon the above-mentioned property, and procure his wife, the defendant, Helen Lukens Gaut, to sign the notes and mortgage. Prior to this, Gaut had borrowed the sum of \$1,200 from plaintiff and had given him a note signed by himself and wife, securing the payment thereof by a grant deed to the property, plaintiff, in turn, giving a receipt which, after stating that the deed was held as collateral security for the payment of the note, reads:

"I have accepted this deed with the understanding in event said James H. Gaut should fail to pay said note then I am at liberty to record said deed and take possession of said property. In event, however, said note is paid, I agree to return said deed to James H. Gaut or assigns.

"(Signed) E. McCONNELL."

Subsequently, plaintiff gave checks to Jas. H. Gaut amounting to some \$5,500, which, together with the \$6,000 mortgage and the \$1,200 note, made up the sum of \$12,700, for which the notes and mortgage mentioned in the agreement were to be executed. Plaintiff then deposited releases of the mortgages held by him with the Title Insurance & Trust Company, with instructions to record them on delivery of the \$12,700 note and mortgage. These instructions were approved by Jas. H. Gaut, who also agreed to pay to the depositary the sum of \$2,500 for the purpose of satisfying other liens and clearing title to the property. Before the

deal was consummated, Jas. H. Gaut died, and the \$12,700 note and mortgage were never delivered to plaintiff.

The court found that Helen Lukens Gaut, respondent, received no part of the consideration for the \$1,200 note, but that she signed it at the request of Jas. H. Gaut, as his wife, and not otherwise; and that she received no part of the moneys borrowed by Jas. H. Gaut, which made up the \$12,700 in notes.

The complaint, as originally framed, prayed for a decree requiring the defendant, individually and as administratrix, to execute and deliver the \$12,700 note and mortgage, or, in case this could not be done, that plaintiff have judgment in the sum of \$6,700. While the action was pending, the prayer for specific performance was abandoned, by stipulation, and the case proceeded for the recovery of a personal judgment.

Appellant attacks the portion of the judgment which exonerates the respondent from personal liability, claiming that she is bound by the acts of her husband as her agent.

[1] Plaintiff testified to several transactions had with Jas. H. Gaut, covering a period of some months, and in each case speaks of dealing with Jas. H. Gaut only. All checks were payable to Gaut, and all memoranda were made in his name alone. The receipt above quoted is an instance. It will be noted that no mention of Mrs. Gaut is made therein. Her only connection with the dealings between plaintiff and her husband was the signing of the \$1,200 note—in which plaintiff apparently did not consider her interested, as he ignored her entirely in his receipt, and also when, at her husband's request, she signed the undelivered note and mortgage. Nowhere does it appear that Gaut assumed to act for his wife as her agent or that he attempted to bind her in any way. Whatever obligation attached to her individually was the result of her own actions. She merely signed her name to the documents affecting the title to real property standing in her husband's name, as a dutiful wife, to facilitate his business. To hold that such actions on her part constituted ratification by her of all previous acts of her husband in his own behalf, as having been done as her agent, would transcend the limits of precedent and reason. The fact that on previous occasions Gaut had procured his wife's signature to notes, and that she had thereby become per-

sonally obligated thereon, could not of itself operate to constitute him her agent for all time and for all purposes; and the record discloses no other act or omission on her part that could be construed either as precedent authorization or subsequent ratification. If the notes and mortgage for \$12,700 had been delivered, she no doubt would have been liable for any deficiency after a sale of the mortgaged property under decree of foreclosure. But that was the extent of her obligation. There being no delivery of the notes and mortgage, she did not become obligated to pay anything on the notes.

The judgment is affirmed.

Finlayson, P. J., and Thomas, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 8, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 2150. Third Appellate District.—May 12, 1920.]

R. L. DARTER, Respondent, v. MARY R. SCHUYLER,  
Appellant.

- [1] **VENDOR AND VENDEE—FAILURE TO MAKE PAYMENTS—TERMINATION OF RIGHTS.**—When, in a contract for the sale of land, time is made of the essence of the contract, an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party, and no notice is required to terminate his rights under the contract.
- [2] **ID.—FORFEITURE BY VENDEE—SUBSEQUENT CONVEYANCE BY VENDOR—ACTION TO QUIET TITLE—PARTIES.**—The default of the vendee in making the payments as called for by the contract of purchase having operated *ipso facto* as a forfeiture of the contract and her rights thereunder, in an action by the grantee under a subsequent conveyance to quiet the title to the property as against such de-

faulting vendee, the grantor is neither a necessary nor a proper party to the action.

- [3] **ID.—WAIVER OF STRICT PERFORMANCE—CONFLICTING EVIDENCE—FINDING—APPEAL.**—The trial court, upon conflicting evidence, having found that the defendant was not excused from making the payments as the same became due, by any act or conduct on the part of her vendor, and that no act or conduct on his part justified her in failing to perform her part of the contract, the contention, on appeal, that there was a waiver of the strict performance of the terms of the contract by the vendor as to such payments cannot be sustained.

**APPEAL** from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge. Affirmed.

The facts are stated in the opinion of the court.

G. W. Langan and True Van Sickle for Appellant.

C. W. Miller for Respondent.

**NICOL, P. J., pro tem.**—This action was commenced by plaintiff to quiet his title to a certain tract of land in the county of San Joaquin, which land he purchased from one J. A. Coley on the twenty-seventh day of June, 1917.

On May 13, 1914, an agreement was entered into between the said J. A. Coley and defendant Mary R. Schuyler, by which Coley agreed to sell and the defendant agreed to buy the said land for the purchase price of \$53,000. The agreement acknowledges the receipt of \$18,000, being the value placed on certain lots in Oakland, and the balance of the purchase price, amounting to \$35,000, to be paid before July 1, 1919, together with interest at the rate of six per cent per annum on all deferred payments, interest to be paid annually. The agreement provides that in consideration of the defendant being given possession of the premises, she agrees to pay all taxes which may be levied or assessed on the premises. That by the terms of the contract, it was expressly provided that time was of the essence thereof, and that in the event of the failure of said Mary R. Schuyler to make any payment at the time the same became due, or within thirty days thereafter, that the contract should become null and void and the said Mary R. Schuyler

should forfeit all right thereto and to all moneys theretofore paid on account of the said agreement.

The defendant failed to make the payments as provided by the contract and as to her failure in this regard the court found, "That subsequent to the execution of said contract said defendant Mary R. Schuyler made certain payments thereunder aggregating the sum of \$1,927.46 and no more; and all of such sum was paid before the first day of January, 1916. . . . That said Mary R. Schuyler failed, neglected, and refused to pay the interest on the purchase price mentioned in said contract or any part thereof as the same became due or otherwise, and also failed, neglected, and refused to pay the taxes levied upon said premises subsequent to the first installment of taxes for the year 1915. That said J. A. Coley made frequent demands upon said Mary R. Schuyler for the payment of the interest and taxes due from her under said contract prior to August 16, 1916. That on the date last mentioned said J. A. Coley notified said Mary R. Schuyler in writing that she was in default and had been in default for more than thirty days in the payments then due and payable under the terms of said contract, and that if she should fail for ten days thereafter to perform said contract and make the payments then due thereunder that she would forfeit her rights under said contract. That said Mary R. Schuyler continued to fail and neglect to make payment of the interest and taxes then due and payable from her under said contract, and has never made nor tendered any amount whatever to apply on said contract since the sixteenth day of August, 1916."

[1] The law is settled in this state that when in a contract for the sale of land time is made of the essence of the contract, an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party (*Champion G. Min. Co. v. Champion Mines*, 164 Cal. 205, [128 Pac. 315]; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713]), and no notice is required to terminate the defendant's rights under the contract. (*Northern Assur. Co. v. Stout*, 16 Cal. App. 548, 554, [117 Pac. 617];

*Newhall Land & Farming Co. v. Burns*, 31 Cal. App. 549, 553, [161 Pac. 14]; *Commercial Bank v. Weldon*, 148 Cal. 601, [84 Pac. 171].) In the case of *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, [159 Pac. 420], the plaintiff sued to quiet title to certain land and the defendants answered, setting up certain contracts for the purchase and sale of the property; upon which they were in default. The court, in passing upon the case, says: "We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief. . . . Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' (Slye and Condon) an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1-16, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713]: 'In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach and no affirmative act upon the part of the vendor was necessary to bring about this result.' "

[2] The defendant claims that J. A. Coley was a necessary party to the action and in the absence of said Coley as a party the contract was a sufficient and complete answer to plaintiff's complaint. We think the cases above cited are a sufficient answer to this contention. The default of defendant in making the payments as called for by the said contract operated *ipso facto* as a forfeiture of the same and of the rights of the vendee thereunder. (*Northern Assur. Co. v. Stout*, 16 Cal. App. 548, [117 Pac. 617]; *Newhall Land & Farming Co. v. Burns*, 31 Cal. App. 549, [161 Pac. 14].) The contract by reason of the said default of defendant had been forfeited and had ceased to exist at the time Coley conveyed the property to the plaintiff, and under these circumstances we do not consider that said Coley was a necessary, or even a proper party to the action.

[3] It is argued that there was a waiver of the strict performance of the terms of the contract by Coley as to the payments of interest and taxes. This contention of the defendant cannot be sustained. The trial court, upon conflicting evidence, found that the defendant was not excused from making the said payments as the same became due, by any act or conduct on the part of said J. A. Coley, and that no act or conduct on his part justified her in failing to perform her part of the contract.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 8, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 3085. Second Appellate District, Division One.—May 13, 1920.]

MYRTLE TENNANT, Appellant, v. JOHN C. CLINE  
et al., Respondents.

[1] SALES — ACTION FOR CONVERSION — DELIVERY OF BILL OF SALE — EFFECT OF CONTINUED POSSESSION.—In an action to recover for the alleged conversion of an automobile claimed to have been improperly seized under attachment process by the defendant sheriff, the jury is properly instructed that if they find that the judgment debtor in the action in which the writ under which the sheriff acted was issued, prior to the time of delivering to plaintiff a bill of sale for the automobile in question, had the use of said automobile, and that thereafter, subsequent to the delivery of said bill of sale, he still continued to have the use and control of said automobile in the same manner and to a like extent, there was no such delivery as the law contemplates as requisite to constitute a valid transfer.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Newmire & Watkins for Appellant.

Joseph Musgrove for Respondents.

JAMES, J.—Appellant brought this action to recover for the alleged conversion of an automobile which is claimed to have been improperly seized under attachment process by defendant Cline as sheriff.

Lucy C. Gentry, in a divorce action against Harry V. Gentry, obtained judgment in April, 1916, for a monthly allowance for the support of herself and minor children and for an additional sum of two thousand dollars, which represented her interest in the community property. The judgment remaining unsatisfied, in February, 1919, Lucy C. Gentry caused the sheriff to levy on the automobile of which the plaintiff here later claimed to be the owner. From the statement of the testimony, as it is set forth in the bill of exceptions, it appears that the plaintiff had been named as the correspondent in the divorce action brought by Lucy C. Gentry against her husband, and that for a long period of time, up to the date when the automobile was taken under the writ, Gentry and this plaintiff lived in a four-room flat and that no other person resided therein; that the automobile in question was used by both of them. The plaintiff testified that she was the owner of the automobile, having purchased it from Gentry in April, 1917, paying him \$150 for his interest in the machine; that after she received the bill of sale Gentry continued to use the car with her permission, and that both of them drove it, and that Gentry had the same use of the car after the bill of sale was made as he had before, with the permission of the plaintiff. The testimony of the plaintiff and of other witnesses further showed that in all dealings with respect to the purchase of the car and the payment of the installments on account thereof, and the making of a loan which was obtained when a chattel mortgage (executed by Gentry) was given upon the security of the machine, Gentry acted alone, excepting that one bill for repairs amounting to a considerable sum was paid personally by the plaintiff. There was testimony of the daughter of the Gentrys as to a statement (made subsequent to the alleged making of the bill of sale) by plaintiff wherein the plaintiff affirmed that the automobile belonged



to Gentry. The deputy who served the writ at the time the car was taken possession of by the sheriff testified that he went to the flat occupied by plaintiff and Gentry, and that Gentry went with him to the garage in the rear of the flats and backed the automobile out of the garage to the street and turned it over, saying: "You won't keep that car long, because it belongs to my father." Defendants, in their answer, alleged that the pretended sale of the automobile by Gentry to the plaintiff was fraudulently made without consideration and with intent to prevent Mrs. Gentry from reaching the property by writ of execution. [1] The case as presented to the jury, however, seems to have left to be resolved, not the question whether actual fraud was intended to be committed in the regard mentioned, but whether, under section 3440 of the Civil Code, there had been such a change of possession and control of the automobile as between Gentry and this plaintiff as to transfer title as against Mrs. Gentry, who was a judgment debtor of the transferor. That section requires, in order that an effectual transfer of title of personal property may be had, that there be "an actual and continued change of possession of the things transferred." The trial court instructed the jury generally as to the requirements of the law in the regard noted, and further gave this additional instruction: "You are further instructed that if you find that H. V. Gentry, prior to the time of delivering to plaintiff, Myrtle Tennant, said bill of sale, dated the fifth day of April, 1917, had the use of said automobile, and that thereafter subsequent to the delivery of said bill of sale, he still continued to have the use and control of said automobile in the same manner and to a like extent, that there is no such delivery as the law contemplates as requisite to constitute a valid transfer." It is contended that the court erred in so instructing the jury and it is argued that because of the relation and association between Gentry and the plaintiff, this instruction was not applicable and constituted prejudicial error. We are cited to the case of *Morgan v. Ball*, 81 Cal. 93, [15 Am. St. Rep. 34, 5 L. R. A. 579, 22 Pac. 331]. In that case the parties between whom the transfer was alleged to have been made of a mare, colt, and buggy were husband and wife, and the court said that, notwithstanding the husband continued to have the use of the prop-

erty, the wife could maintain her title. The court, however, stated in the opinion that it had been proclaimed by the husband that the property was that of the wife and had been publicly known and recognized as hers by all who used it, the court saying: "She did not refuse her husband the use of it, but she did take it into possession at once and continuously keep and use it as hers as to all the world, and it was not in any way used or possessed by her husband, except as subordinate to her dominion, possession, and control." That decision does, to some extent, bear the intimation, as appellant contends, that where the relationship of husband and wife exists, possession by the husband of the property alleged to have been transferred will not preclude the wife from maintaining her title. However, the later case of *Murphy v. Mulgrew*, 102 Cal. 547, [41 Am. St. Rep. 200, 36 Pac. 857], refers to *Morgan v. Ball*, *supra*, and contains the following declaration: "The fact that a vendor and vendee are husband and wife, or parent and child, is no reason why the provisions of the statute should receive a different or more liberal construction. Those conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial." And, moreover, in this case it appears that the parties were not related at all. They occupied the same four-room flat for reasons of their own, and, so far as the evidence shows, did not hold a partnership interest in the particular property alleged to have been converted. It was for the jury to determine from the facts, under the court's instructions, whether there had been such transfer and change of possession of the property as would sustain plaintiff in the cause of action asserted.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 511. Third Appellate District.—May 13, 1920.]

In the Matter of the Application of WALDO S. JOHNSON  
for a Writ of Habeas Corpus.

- [1] MUNICIPAL CORPORATIONS—NATURE OF ORDINANCE—TITLE NOT CONCLUSIVE.—In determining whether a municipal ordinance is a revenue measure or is regulatory in its nature, and therefore beyond the powers of the municipality, the courts will look to the substantive provisions of the ordinance, the title of the ordinance, even though it contain the word "regulating," not being conclusive.
- [2] ID.—MARYSVILLE—LICENSE ORDINANCE—REVENUE MEASURE.—Ordinance No. 188 of the city of Marysville, entitled, "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations," is a revenue measure.
- [3] ID.—VIOLATION OF ORDINANCE—MISDEMEANOR UNDER STATE LAW. Section 435 of the Penal Code, which provides that a failure to take out a license when required by a law of this state shall constitute a misdemeanor, covers a violation of such an ordinance, regardless of whether the city had the power to provide that a violation of the ordinance should constitute a misdemeanor.
- [4] ID.—NONPAYMENT OF LICENSE TAX—IMPRISONMENT—CONSTITUTIONAL LAW.—Imprisonment on conviction for nonpayment of a license tax imposed by a municipal ordinance is not an imprisonment for debt within the meaning of article I of the constitution.
- [5] ID.—BUSINESS OF LAWYER—RIGHT TO LICENSE.—For the purpose of raising revenue, a municipal corporation has the power to impose a license for carrying on the business of a lawyer at a fixed place of business within the city.

PROCEEDING on Habeas Corpus to secure the release of a lawyer imprisoned for failure to pay a license tax. Writ dismissed and petitioner remanded.

The facts are stated in the opinion of the court.

M. T. Brittan, W. E. Davies and Waldo S. Johnson, *in pro. per.*, for Petitioner.

W. P. Rich for Respondent.

PREWETT, P. J., *pro tem.*—The petitioner was convicted under section 1 of Ordinance No. 188 of the city of Marysville, and he seeks his discharge from the imprison-

ment which followed such conviction. Section 1 requires that every person carrying on certain specified callings shall, before commencing the same, procure a license therefor, and section 80, so far as pertinent to this inquiry, reads as follows: "Section 80. Every person engaged in business as a lawyer, *maintaining an office in said city*, shall pay a license of \$2.50 per month." The petitioner, a lawyer by occupation, maintains an office in said city and he neglected to take out the license demanded by said section 1. No point is made as to sufficiency of the judgment in mere matters of form.

(1) It is contended that the ordinance in question is regulatory in its nature and therefore beyond the powers of the municipality. It is conceded that the business in question is not one that can be "regulated" under the police powers of cities and counties. Unless, therefore, the ordinance is a revenue measure, it cannot be upheld. [1] The title of the ordinance is cited to the court as an evidence that the municipality, in adopting the ordinance, intended it as a regulatory provision. The title reads: "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations." It is true that this title contains the word "regulating," but this is not conclusive. The court will look to the substantive provisions of the ordinance to determine its legal effect. It happens that this title is copied in precise words from that considered by the court in *Ex parte Braun*, 141 Cal. 204, [74 Pac. 780]. The court, in arriving at the conclusion that the ordinance considered in that case was for revenue and not for regulation, uses the following language: "It is devoid of regulating provisions, being devoted entirely to the imposition of a license tax upon various trades and occupations, and the collection thereof. It imposes a license tax upon a great majority of callings and occupations and, in several instances, the amount of the tax is based upon the amount of business transacted. It includes numerous callings which are in no degree subject to regulation. . . . Taking into consideration the absence of regulatory provisions, the amounts of the several taxes imposed and the nature of many of the subjects of taxation named in the ordinance, including the particular business here involved, it is very clear that the license tax upon the business

alleged to be conducted by petitioner was imposed solely for the purpose of raising revenue." The language just quoted is peculiarly applicable to the ordinance now under examination. Although two justices dissented from the opinion in that case, their dissent was based upon other points. The case has been often cited in later reports and, so far as we are informed, its doctrines have never been questioned. A title is not an indispensable part of an ordinance. It may have a defective title. (*Ex parte Haskell*, 112 Cal. 412, [32 L. R. A. 527, 44 Pac. 725]; *Ex parte Young*, 154 Cal. 321, [22 L. R. A. (N. S.) 330, 97 Pac. 822].) [2] It clearly appears that the ordinance in question is a revenue measure.

[3] (2) The petitioner insists that the city has no power to provide that a violation of the ordinance shall constitute a misdemeanor. It is immaterial whether or not it has such power or has attempted unsuccessfully to exercise it. An ordinance is deemed to be "a law" in this state. Section 435 of the Penal Code provides that a failure to take out a license when required by a law of this state shall constitute a misdemeanor.

This section covers a violation of an ordinance. (*Ex parte Lawrence*, 69 Cal. 608, [11 Pac. 217]; *Ex parte Christensen*, 85 Cal. 211, [24 Pac. 747].)

[4] It is further insisted in the brief of petitioner that imprisonment on conviction for nonpayment of a license tax is an imprisonment for debt and therefore unlawful, though no authorities are cited in support of this claim. It has been so long conceded in this state that imprisonment for failure to pay a license tax is not an imprisonment for debt within the meaning of article I of the constitution, that the question can scarcely be deemed to be open for discussion. Failure to procure a license in a case required by law, is a neglect of a duty due to the public. For such neglect the offender may be punished by imprisonment. In such case, the punishment is penal and not merely in the nature of a remedy. It is not auxiliary to a civil action. Even after the offender shall have suffered the specified number of days imprisonment, the money obligation is still unpaid. The penalty imposed is a mere punitive burden exacted as a means of deterring the offender and others from the commission of like delinquencies in the future. In *Ex parte*

*Bagshaw*, 152 Cal. 701, [93 Pac. 864], the court, through its chief justice, uses the following language: "The legislature of the state has seen fit to make it a crime under the state law for any one to carry on a business for which a license is required by any law or ordinance, without procuring such license, and one who does so, not only disobeys the ordinance, but violates the state law and is guilty of a crime by reason of the express provision of such law."

The petitioner is not charged with a failure to pay his license tax. The charge is that he carried on a certain business without first procuring the necessary license. The section of the Penal Code above cited does not purport to fix a license fee nor does it provide for the issuance of a license. It would be unprofitable to multiply authorities to show that our courts have again and again upheld the power of the legislature to prescribe a punishment for failure to procure a license before carrying on certain lines of business.

[5] (3) The chief claim of the petitioner is that the city has no power to license the business of a lawyer. It is pointed out that a lawyer is licensed as such by the courts, that his license is in the nature of a vested right and that any act of the legislature curtailing this right would impair the obligation of a contract. Without conceding that these claims are well founded, they are, nevertheless, inapplicable to the case. It is true that a license cannot be imposed upon a lawyer, nor can his business be regulated by ordinance. But the petitioner is not charged with practicing law without a license, but with "carrying on a trade, calling, profession or business" without first procuring a license. Sections 1 and 4 of the ordinance, when read in connection with section 80, above quoted, show clearly that the license is exacted for "carrying on the business of a lawyer at a fixed place of business." The propriety of exacting revenue from one who maintains an office and carries on a business within a city is apparent. Many expenditures by the city are rendered necessary by reason of an office or other place of business within its limits. Petitioner relies with much confidence upon the *City of Sonora v. Curtin*, 137 Cal. 583, [70 Pac. 674]. This case, however, is not in point. The defendant, Curtin, was charged with failure to pay a license tax under an ordinance which provided that "every law-

yer shall pay a license of three dollars per quarter." It was held in that case that a license tax cannot be levied upon a person nor upon such of his acts as fall short of carrying on a business. The distinction was sharply drawn by the court between a license upon the business of practicing law and a license upon a person because he is an attorney at law. There appears to be no inherent difference between carrying on the business of practicing law and carrying on any other business or pursuit. It is not questioned that the state may, in the exercise of its sovereign powers, levy license taxes upon merchants and manufacturers who maintain places of business, and this, too, for the sole purpose of raising revenue. A lawyer's office makes certain demands upon the various fire, police, street, and other functions of a city, which differ from above classes only in quantity and not in quality. If the one should be required to assist in keeping up the revenues of a city, no reason is apparent why the other should not. Whether a license might be exacted for carrying on a law business without maintaining an office is a question that is not before the court. We entertain no doubt that a state license issued to a lawyer authorizing him to practice law is not a bar to the claim of a city to levy a license for maintaining an office in connection with such practice. For many years the state has licensed druggists, but it has not been suggested that a druggist's license is the equivalent of a license to run a drug-store. No adequate reason is discovered why the commitment should be disturbed. Writ dismissed and petitioner remanded.

Hart, J., and Burnett, J., concurred.

[Civ. No. 2825. Second Appellate District, Division One.—May 13, 1920.]

**SUGAR LOAF ORANGE GROWERS ASSOCIATION, Respondent, v. H. G. SKEWES, Appellant.**

- [1] **ACCOUNTS—ACTION FOR BALANCE DUE—ADMISSIBILITY OF LEDGER ACCOUNT.**—In an action upon a mutual, open, and current book account to recover the balance due and owing to plaintiff for the picking, hauling, washing, packing, and shipping of defendant's oranges during a specified season, the ledger account contained in a book kept by the plaintiff and showing its account with defendant is admissible, where the entries made in such book by the secretary and general manager of the plaintiff association from information furnished him by other employees of plaintiff, all of which was in the usual course of business of the plaintiff, were the original and only entries made by the plaintiff.
- [2] **ID.—SALE OF CROP OF ORANGES—AUTHORITY OF GROWERS' ORGANIZATION TO PAY LOSSES—LEDGER ENTRIES FROM "ACCOUNT SALES."**—Duplicate copies of "account sales" showing the receipts from the sales of a given crop of oranges and the charges for freight, refrigeration, and auction commissions, received by a growers' organization in the usual course of business from the organization which acted as the selling agent, constitute a reasonable basis of authority to such growers' organization to pay out the balance charged to it on the loss incurred by the sales of the crop of the grower and to charge the latter the amount so paid out by it for his account; and the ledger entries made by such growers' organization in the book kept by it showing its account with such grower may be regarded as the original entry of its account against such grower.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

Benjamin Lewis, Mab Copland and H. M. Linneman for Appellant.

Bicksler, Smith & Parke for Respondent.

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1. Necessity that book of accounts offered in evidence be book of original entry, note, 2 *Ann. Cas.* 842.



CONREY, P. J.—As stated in the complaint, the cause of action sued on herein is an alleged indebtedness of the defendant to the plaintiff “upon a mutual, open, and current book account, said sum of \$532.07 being the balance due and owing to plaintiff for the picking, hauling, washing, packing, and shipping of defendant’s oranges during the season of 1912, together with certain moneys advanced by the plaintiff therefor at defendant’s request, after deducting therefrom and crediting to the defendant all moneys received by the plaintiff for the defendant from the sale of defendant’s oranges.” The principal contention of appellant is that the court erred in overruling his objection to the introduction in evidence of a ledger account contained in a book kept by the plaintiff and showing its account with defendant. It is claimed that no sufficient foundation was laid for the admission in evidence of said ledger account. To the extent of \$508 the account shows the items charged for picking, hauling, washing, and packing the oranges taken from defendant’s orchard, together with a selling charge of ten cents per box for the 750 packed boxes as shipped. The remaining items consist of an “account sales” showing the receipts from the sales and the charges for freight and refrigeration and for auction commission. The net result of the “account sales” was a balance of \$24.07 debited against the defendant; thus making the total balance of \$532.07, constituting plaintiff’s claim. The witness E. F. Wolever was secretary and general manager of the plaintiff. Plaintiff’s method of doing business was described by this witness. Plaintiff is a growers’ organization which handles the growers’ crops on an estimated cost basis. The Mutual Orange Distributors is a corporation having its central office at Redlands, California, which acts as the selling agent for a group of orange growers’ associations, the plaintiff being one of those associations. In the instant case, the plaintiff agreed to pick, haul and pack defendant’s oranges and cause the same to be shipped and sold through the agency of the Mutual Orange Distributors. This was done and the account sued upon is the result of that transaction.

[1] It appears from the testimony of Wolever that he personally paid out all of the moneys constituting the items charged against the defendant; and that he was personally

acquainted with the facts with respect to the picking, hauling, washing, and packing of the oranges and the payment of the ten cents per box commission to the Mutual Orange Distributors. He did not count and observe every detail, but he saw the work going on in defendant's orchard and saw the fruit received at the packing-house. For actual time of the work of the men in the orchard and in hauling, he relied upon information furnished to him by the plaintiff's foreman at the orchard, the receiving clerk at plaintiff's packing-house, and upon statements of the pickers themselves, all of which was in the usual course of business of the plaintiff. The entries made by Wolever in the ledger account were the original and only book entries made by the plaintiff; that is to say, the ledger entries were not copies from any other book or memorandum of the plaintiff.

From the foregoing evidence we are satisfied that the ledger was admissible in evidence to prove the items constituting the first mentioned charge amounting to \$508. As to the "account sales," a separate statement will be made herein. The rule of evidence applying to account-books is stated in *Chan Kiu Sing v. Gordon*, 171 Cal. 28, [151 Pac. 657], as follows: "In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in the regular course of the business, that the business is of a character in which it is proper or customary to keep such books, that the entries were either original entries or the first permanent entries of the transactions, that they were made at the time, or within reasonable proximity to the time, of the respective transactions, and that the person making them had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business, whose duty it was to make the same in the regular course of business. (1 Elliott on Evidence, secs. 458 to 463, inclusive; 2 Wigmore on Evidence, sec. 1554; 2 Jones on Evidence, sec. 322.)"

Counsel for appellant concede that Mr. Wolever did have knowledge, either direct or indirect, of the transactions concerning the packing, etc., of the oranges, and lay the emphasis of their objection upon that part of the ledger constituting the "account sales." The witness Wolever testified that he represented the plaintiff as one of the sub-

sidiary associations making up the Mutual Orange Distributors, and was a member of the board of directors of the Mutual Orange Distributors. As such director he was familiar with the system under which the fruit was shipped, sold and accounted for through that agency. [2] The Mutual Orange Distributors shipped to various representatives throughout the country the fruit received by it and the sales were made through these representatives, who then reported to the Mutual Orange Distributors by rendering in each case an "account sales" in the form of duplicate carbon copies containing the several statements of account. One of these duplicates is kept by the Mutual Orange Distributors as its record of the transaction, and the other is sent to the fruit growers' organization. Thus, in the instant case there were three "account sales"; one for each of the three cars in which the fruit was shipped. One came from Cleveland, one from New York, and one from Boston. All of the sales were made at auction. Of the duplicate copies so received by the Mutual Orange Distributors, one of each was delivered to the plaintiff. It was from those statements that the entries were made by Mr. Wolever in the ledger account introduced in evidence in this action. The witness Wolever testified that the accounts of sales thus furnished constituted all of the memoranda and data which under that method of doing business are used in making settlements. In connection with the cross-examination of Mr. Wolever, the defendant called for the said accounts of sales furnished to plaintiff by the Mutual Orange Distributors and introduced them in evidence. They are in the record as defendant's exhibit "R," and correspond in amounts to the entries contained in the ledger account. No evidence to contradict them was offered by the defendant. It appears to us that if there was any error in the reception of the ledger account in evidence as covering these items of the "account sales," such error is cured by the introduction in evidence of said exhibit "R" at the instance of the defendant himself. Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales and to charge to the defendant the amount so paid out by the plaintiff for his account.

Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant.

Appellant next contends that the evidence is insufficient to support the court's finding that the account sued upon is true and correct, "and constitutes an open, current, mutual, and book account." We think that the evidence established the character of the account as a mutual, open, and current account; it being within the following definition: "An unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account-books of the owner of the demand, . . ." (*Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 253, [146 Pac. 692]; *George Rice & Sons v. Cowan*, 46 Cal. App. 225, [189 Pac. 132].) This being so, the cause of action was not barred by the statute of limitations, since the action was commenced within the period of four years from the time when the cause of action accrued. (Code Civ. Proc., sec. 337, subd. 2.)

The judgment is affirmed.

Shaw, J., and James, J., concurred.

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[Civ. No. 3307. Second Appellate District, Division One.—May 13, 1920.]

P. J. LEAVER, Respondent, v. SAMUEL T. SMITH,  
Appellant.

- [1] EXECUTION — SALE OF REAL PROPERTY — TITLE OF PURCHASER — NECESSITY FOR DEED.—Under section 700 of the Code of Civil Procedure, a purchaser of real property under execution sale, from the time he receives his certificate of sale, is endowed with the full legal and equitable title of the judgment debtor, except that within the ensuing period of twelve months after sale an equity of redemption is possessed by the judgment debtor; and the issuance of a deed is not essential to the vesting of title in the purchaser.
- [2] QUIETING TITLE — ERRONEOUS JUDGMENT — RES JUDICATA.—Where the purchaser of real property under execution sale, after the period of redemption has expired but before a deed is issued to

him, institutes an action to quiet title to the property as against the judgment debtor and the judgment against him, though erroneous, is allowed to become final, he is estopped from thereafter instituting a new action to quiet title as against said judgment debtor, notwithstanding that subsequent to judgment in the first action a deed has been issued to him.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Reversed.

The facts are stated in the opinion of the court.

Wm. T. Kendrick for Appellant.

M. I. Grossman and Charles M. Ackerman for Respondent.

JAMES, J.—In this action to quiet title plaintiff had judgment and defendant appeals. The complaint was in the usual form appropriate to the character of the action. In addition to a general denial, the defendant made a special plea in his answer by alleging a former judgment between the parties for the same cause. That portion of the answer is as follows: "That heretofore, to wit, on the — day of March, 1917, an action was commenced by the plaintiff in this court against each of these defendants, wherein it was alleged that the plaintiff was the owner of said property and wherein it was also alleged that the defendants, and each of the defendants, had no right, title, or interest in said property. That the said defendants appeared in said action and the said cause came on regularly for trial before said court on the eleventh day of December, 1917, and thereupon said court duly made and gave judgment against the plaintiff and in favor of defendants thereby adjudging that plaintiff take nothing in said action and that defendants recover their costs." Samuel T. Smith is the only defendant interested, as the action was dismissed as to Anna May Smith, who was first named in the complaint as Jane Doe. The trial court made particular findings by way of showing the facts upon which the judgment was predicated. From these findings it appears that appellant here, in 1914, became a judgment debtor of one Leaver; that upon execution being levied against the real property herein involved, then belonging to appellant, a sale was made and the property was purchased by the plaintiff, the judgment creditor;

that the execution sale was made on the third day of February, 1916; that no redemption of the premises having been made in the meantime, deed was delivered to the purchaser on the eleventh day of December, 1917. As to the former judgment pleaded by appellant, the court made its findings as follows: "That it is true that an action was commenced in March, 1917, by plaintiff in this action, and against defendant in this action, for the purpose of quieting title to the premises herein described. That all of the allegations contained in the further and separate answer to plaintiff's complaint, set out in the answer of defendant herein, are true." Conclusions of law followed wherein it was determined that the plaintiff should have a decree quieting his title to the property described in the complaint.

It is appellant's contention that the plea of the former judgment adjudicating the same matter between the same parties was sustained by the evidence, and that the court should have held that the plaintiff was estopped from re-asserting claim to the property described. No question is made as to the correctness of the findings of fact in their material parts. From such findings and from the undisputed evidence exhibited in the bill of exceptions we may summarize the occurrences material for consideration as follows: Execution sale of the defendant's property was made and certificate of sale was given and recorded on February 3, 1916; deed to the same was delivered December 11, 1917. Plaintiff's first action to quiet title was commenced (as appears from the court's findings) in March, 1917; trial of that action was had on December 11, 1917, and judgment entered on December 18, 1917. This action, being the same in form as the preceding action, to wit, to quiet title to the same property against the same defendant, was commenced on October 23, 1918, and judgment was rendered on January 21, 1919. While the evidence heard at the trial of the first action is not shown, we can surmise that the plaintiff was refused a decree in the first action because at the time the action was commenced a deed had not been issued to the property, the opinion of the trial judge evidently being—for it is emphasized here in the brief of respondent—that a cause of action to quiet title would not mature upon the execution sale until formal deed was issued; that conclusion being derived from the

assumption that the purchaser at an execution sale, and until he secures a deed, obtains only an equitable title which is not sufficient to sustain a cause of action as against the holder of the legal title. Before considering further the question just suggested, attention is called to the fact that, as the execution sale was held and certificate of title issued on February 3, 1916, the full period for redemption had expired prior to the commencement of the first action in March, 1917. In other words, that at the time plaintiff commenced his first action the right of redemption had been lost in the judgment debtor, and the plaintiff was entitled, upon demand, to his deed. (Code Civ. Proc., sec. 702.) [1] It is important to the question of the alleged estoppel which the first judgment worked against the plaintiff to inquire as to the character of title which the purchaser at an execution sale is endowed with from the time he receives his certificate of sale. Section 700 of the Code of Civil Procedure provides that, "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; . . ." The effect of this provision is to confer upon the purchaser full title, except that within the ensuing period of twelve months after sale an equity of redemption is possessed by the judgment debtor. When the full period of twelve months has elapsed there no longer exists any equity in the judgment debtor; hence the purchaser becomes possessed of an absolute title at that time. Such was the case here at the time plaintiff commenced his first action to quiet title to the real property. The issuance of a deed was not essential to the vesting of title in the plaintiff; nor was such deed necessary and indispensable evidence of the title of the plaintiff. Respondent has cited *Knight v. Fair*, 9 Cal. 117, which is favorable to his contention that upon the sale of real property under execution an equitable title only is conferred upon the purchaser. That case, however is considered in *Pollard v. Harlow*, 138 Cal. 390, [71 Pac. 454, 648], and attention is called to the fact that *Knight v. Fair* was decided under the Practice Act when the state of the law was different from that which was carried into the code. The court, in *Pollard v. Harlow*, *supra*,

said: "The language of section 700 of the Code of Civil Procedure is, that upon the sale of the property 'the purchaser is substituted to and acquires *all* the right, title, interest, and claim of the judgment debtor thereto,' which is to say unequivocally that he acquires the *legal* as well as the equitable title. The only qualifications are, that (when not a leasehold of less than two years' unexpired term) the property shall be 'subject to redemption'; that a deed shall be subsequently given (Code Civ. Proc., sec. 703); and that pending the time for redemption the possession shall remain with the defendant. (Code Civ. Proc., sec. 706.) But no one of these qualifications is inconsistent with the vesting of the legal title in the purchaser. With regard to the first, the case is simply the familiar one of a legal title, defeasible upon the happening of a condition subsequent; and as to the second, the deed gives 'to the purchaser no new title to the land purchased by him, but is merely evidence that the title has become absolute.' (*Robinson v. Thornton*, 102 Cal. 680, [34 Pac. 120].)" [2] As to the binding effect of the former judgment: That judgment was between the same parties as appeared in this suit; the cause of action was stated substantially in the same manner. In the first action plaintiff alleged ownership of the property and sought to quiet title against the claims of the defendant. Plaintiff was called upon there to furnish evidence of any title that he had, or be estopped from further asserting a claim based upon the same evidence. "If the cause of action in which the judgment was rendered was the same as the cause of action in which the judgment is plead, and both actions have been brought to obtain relief at law or in equity upon the same cause of action, the last action is subject to the estoppel of the judgment in the former action. And the judgment as rendered in that action is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case (*Phelan v. Gardner*, 43 Cal. 306); and the presumption of law is that all such issues were actually heard and decided. (Subd. 18, sec. 1963, Code Civ. Proc.)" (*Parnell v. Hahn*, 61 Cal. 132.) It therefore appears that the plaintiff, at the time he brought his former action could have made proof of the sale under execution to him of the real



property and the receipt of the certificate of sale. As that sale was had and certificate made and recorded on February 3, 1916, it would have appeared that at the time the former action was commenced no equity of redemption was left with the defendant; hence that the plaintiff had become possessed of an absolute title. In other words, it appears that plaintiff in the first action could have introduced precisely the same evidence as he introduced at the second trial to prove his title, with the one exception that at the second trial he offered the additional evidence of the deed issued to him. As we have before stated, we do not consider that the production of the deed was in anywise necessary to the proof of title of the plaintiff derived under the execution sale. His case was complete without the production of such a deed. The situation, then, is that the first judgment was entered against the plaintiff upon the merits upon the same essential evidence that was received in the second case, and under such circumstances we have no doubt that the first judgment should be held to have adjudicated the rights of the parties to this action; hence the plaintiff is estopped from bringing the defendant a second time into court for the same cause. The first judgment was not appealed from and at the time of the trial of this action (although not at the commencement of the action) had become final.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 3318. Second Appellate District, Division Two.—May 14, 1920.]

M. H. HARRIS, Respondent, v. BESSIE M. BURT (a Widow), Appellant.

- [1] **APPEAL—ALTERNATIVE METHOD—DUTY OF REPORTER TO MAKE AND FILE TRANSCRIPT.**—Where an appeal is taken under the alternative method provided by sections 953a and 953b of the Code of Civil Procedure, it is the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given and the bond provided for in said sections has been filed, and to file such transcript with the clerk. He cannot refuse to so file because his fees remain unpaid.
- [2] **ID.—REFUSAL OF REPORTER TO PREPARE TRANSCRIPT—DUTY OF APPELLANT—DISMISSAL OF APPEAL.**—Where an appeal is taken under such alternative method and the stenographic reporter refuses to make a transcript of the report of the trial until his fees are paid in advance, the appellant, with knowledge of such refusal, should take legal steps, by *mandamus* or otherwise, to compel the reporter to act, and if he does not do so, and the clerk's and the reporter's transcripts are not filed in the appellate court within the time provided by law and the rules of the supreme court, a motion to dismiss the appeal will be granted.

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County. Appeal dismissed.

The facts are stated in the opinion of the court.

R. T. Lightfoot for Appellant.

Arthur Wright for Respondent.

THOMAS, J.—Motion to dismiss appeal. From the record before us it appears that a judgment was entered against the defendant here in the superior court of Los Angeles County on the twenty-first day of June, 1919, for a total sum of \$412.74; that on the third day of July, 1919, a notice of appeal to the supreme court was filed by the defendant in that court; that at the same time and place defendant also filed a demand for transcript, in accordance with the provisions of section 953a of the Code of Civil Procedure, and gave an undertaking on appeal, with stay of

execution, duly approved by the clerk of that court, as well as the undertaking provided for by section 953b of the Code of Civil Procedure, in the sum of one hundred dollars, agreeing to pay to the clerk the cost of preparing such transcript, which undertaking was likewise duly approved by the clerk; and that thereafter the clerk prepared what is usually denominated as the "Clerk's Transcript," which transcript was regularly filed in the superior court.

It also appears that the official reporter who reported the case, Mr. Henry Henderson, received no notice requiring the preparation of a phonographic report of the trial until Saturday, July 26, 1919, and that until the receipt of such notice he had no knowledge that defendant intended to appeal the case. On Monday, July 28, 1919, the official reporter wrote, signed, and mailed, with postage prepaid, a letter addressed to defendant's attorney of record, and who appeared before this court in opposition to this motion, which letter was in words and figures as follows:

"Room 560, Court House.

"Los Angeles, Cal., July 28, 1919.

"Mr. R. T. Lightfoot,

"Attorney at Law,

"916 Washington Bldg., City.

"Dear Sir: Saturday noon your notice of appeal and request for transcript in *M. H. Harris vs. Bessie M. Burt*, No. B71930 was handed to me, being the first notice I had had that you desired a transcript, and now, at my first opportunity, I have looked up the case and made an estimate of the cost thereof. The estimate of my fees for the Reporter's Transcript on Appeal is \$53.20. If you desire an office copy the fee will be one-half more, or \$79.80. I notice your notice was filed July 3rd, but if you have complied with your part of the statutory requirement, the provision as to time of filing transcript being, as I understand, merely directory, your client's rights would, I assume, not suffer by the delay. Having had no communication from you or any one about it until Saturday, I am not to blame. If you wish me to go ahead with the work, upon prepayment of my fees I will do so promptly.

"Respectfully yours,

"(Signed) HENRY HENDERSON,

"Official Reporter."

The statements contained in this letter are not denied. They are without conflict. Mr. Henderson, in his affidavit into which the foregoing letter is incorporated, says that he heard nothing further regarding the transcript or the proposed appeal "until just recently, when he was informed by plaintiff's attorney of the circumstances of the present motion to dismiss the appeal."

Nothing has ever been done by appellant, or anyone else, except as above stated. There has not been filed with the clerk of the supreme court, or with the clerk of this court, any transcript, brief or other papers, except those in connection with the motion now before us.

The motion is based upon two grounds: (1) That the transcript of the record in said action has not been filed; and (2) that no points and authorities have been filed. The motion is based upon the certificate of the clerk of the superior court in which said cause was tried, and the affidavit of respondent's attorney.

It is contended by appellant that, having done all that the law requires in order to be entitled to the benefit of an appeal under the so-called "alternative method," she should not be made to suffer because of the neglect, failure or refusal of the clerk to perform his duty. In this we quite agree. But such things do sometimes happen in the best regulated offices. When they do, and when this fact is known, as in the instant case, by the appealing party, the latter cannot sit idly by neglecting, failing, or absolutely refusing to avail himself of any of the several provisions of law to compel the performance by the proper officer of his duty in such case, and by such neglect, failure, or refusal succeed in depriving the opposing litigant of the fruits of a righteous judgment (if such it be), and escape the granting of a motion to dismiss the appeal under such circumstances.

There are on file before us two certificates by the county clerk of Los Angeles County. By one of these it is shown that the judgment attempted to be appealed from was entered on June 9, 1919. By the other, the same judgment is shown to have been entered on June 21, 1919. Which certificate is correct, we do not assume to say; but have given appellant the benefit of our doubt, and have accepted the latter as showing the correct date of entry.

Section 953a of the Code of Civil Procedure provides, among other things, that "any person desiring to appeal from any judgment . . . to the supreme court or any of the district courts of appeal, may . . . file with the clerk of the court from whose judgment . . . said appeal is taken . . . a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony . . . be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment." With this provision in mind, there being nothing before us to show when, if at all, appellant was served with notice of entry of the judgment from which she attempts to appeal, and the notice of appeal, as we have already seen, having been filed on July 3, 1919, it will be assumed that such notice was filed as by said section provided. From the certificates of the clerk referred to, it appears that no transcript of the phonographic report of the trial has been prepared or filed "in the office of the county clerk, as demanded and for which bond was given, and the time for settling and approving same has expired."

There is conflict in the evidence as to whether appellant's attorney ever made demand on the court reporter for such transcript, except by filing such notices and undertakings with the clerk as stated. Appellant's attorney says that he did make such demand; while the reporter, on the other hand, says that appellant's attorney "has not communicated with affiant either verbally or in writing relative to said transcript." We think, however, that this is immaterial. At any rate, we are certain that for a long time, taking the affidavit of appellant's attorney at its full face value, the latter well knew that such transcript had not been prepared, and that the reason for it was, according to his own statement, as set forth in his affidavit, "that said Henderson *refused at all times* to deliver said stenographic report unless he should have been paid in advance therefor by the defendant and appellant." (Italics ours.)

[1] "Where an appeal is taken under the alternative method provided by sections 953a and 953b of the Code of Civil Procedure, it is the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given" and the bond provided for in said sections has been filed, "and

to file such transcript with the clerk. He cannot refuse to so file because his fees remain unpaid." (*Gjurich v. Fieg*, 160 Cal. 331, [116 Pac. 745].) Rule II of the supreme court provides that "the appellant in a civil action shall, within forty days after an appeal is perfected, except as hereinafter stated, serve and file the printed transcript." Following this is a provision covering the procedure where the appeal is taken by the method adopted in the case at bar. Section 3 of that rule provides that "the time above limited may be extended by written stipulation, or by order, based on affidavit, showing good cause therefor." Section 953a, *supra*, provides that "upon receiving said notice *it shall be the duty of the court to require the stenographic reporter to transcribe fully and completely the phonographic report of the trial.*" (Italics ours.) Section 1085 of the Code of Civil Procedure provides that a writ of mandate "may be issued . . . to any . . . person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. . . ." Here, then, are indicated various methods which appellant might have pursued, and by so doing avoid her present unfortunate situation, the first of which would have cost nothing but a few moments for the preparation of the necessary papers, and their service upon the stenographer. The second would probably have produced the desired result with but little inconvenience or expense on the part of appellant. For we cannot believe that any stenographer would disregard the order of the judge in whose department he was reporting, particularly upon such judge calling his attention to the case of *Gjurich v. Fieg*, *supra*. The latter method—writ of mandate—without doubt would have resulted satisfactorily.

[2] With these facts before us, and considering the same in the light of the case above cited (where the supreme court, in intimating what might be considered the proper procedure, said: "In this view of the law it was, of course, within the power of the appellant to have had mandate issued against the stenographic reporter to compel him to file his transcript with the clerk as the law contemplates, and in ordinary cases appellant's failure to do this within a reasonable time might be construed to be such lack of diligence as to justify the dismissal of an appeal")—that

case having been decided July 1, 1911, more than eight years ago—we think that a denial of respondent's motion would be a miscarriage of justice, and would transcend the limits of both precedent and reason.

It was not to respondent's interest to take any steps other than those taken here. Appellant cannot in one breath insist that she believes her attempted appeal to be well taken and in the next that it is immaterial to her whether the stenographer ever prepares and files such transcript. If it be contended that appellant had the right to await the pleasure of the stenographer, we answer that in availing herself of such right she must use it in such a way as not to infringe upon the rights of respondent here. There being, as we have seen, legal methods by at least one of which appellant could have compelled the reporter to act, and failing or refusing to avail herself thereof, she cannot now be permitted to take advantage of her own neglect and by so doing defeat this motion. In our opinion the legal maxim: "The law helps the vigilant, before those who sleep on their rights," applies here.

It is therefore held that because of the facts with which we are confronted, and for the reasons herein expressed, the motion presented must be granted.

The appeal is dismissed.

Finlayson, P. J., and Weller, J., concurred.

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[Civ. No. 3350. First Appellate District, Division Two.—May 14, 1920.]

J. L. VAUGHN, Respondent, v. CHARLES FEY, Appellant.

- [1] CONTRACTS — ADVANCEMENT OF MONEY TO PERFECT INVENTION — PARTIAL BREACH — RESCISSION — RESTORATION.—Where defendant agreed to advance to plaintiff, an inventor, the moneys necessary to pay for time spent and materials used in the building of a new invention for automatically changing phonograph needles and for a patent thereon, in consideration of the transfer to defendant of a one-half interest in such patent, and there was a partial breach of such contract by defendant, entitling plaintiff to rescind the

same, he may only do so upon returning to defendant everything of value received from defendant under the contract.

- [2] **ID.—PAYMENTS MADE TO OTHER THAN PLAINTIFF—ACCEPTANCE OF BENEFITS—OBLIGATION TO RETURN.**—The fact that a part of such money was not paid directly to plaintiff, but to the patent office for a patent and to vendors of materials for supplies to be used in completing the model, does not affect plaintiff's obligation to return the same to defendant, where such money was paid under the contract for the benefit of plaintiff and to enable him to perfect his invention, and he accepted the benefits thereof.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. J. W. Mahon, Judge presiding. **Reversed.**

The facts are stated in the opinion of the court.

Maurice R. Carey for Appellant.

Devoto, Richardson & Devoto for Respondent.

**LANGDON, P. J.**—This is an appeal by the defendant from a judgment annulling a contract which had been entered into between the parties hereto. J. L. Vaughn, being the inventor of certain improvements on an automatic phonograph, embodying in particular a new invention for automatically changing the steel needle used for producing the sound from the records, desired to perfect and patent this device, and for this purpose entered into a contract, on June 22, 1916, with Charles Fey, by which contract Fey agreed to advance money to pay for all of the materials required for the building of a model and to furnish shop-room for the building of the same, and to pay to Vaughn twenty dollars each week for a period of ninety days from the date of the agreement, to cover the time Vaughn would be engaged in working upon the model, and also to advance a sufficient sum to cover the cost of securing a patent in the United States upon the said invention, to be applied for when the working model was completed and perfected. In consideration of this agreement by Fey, Vaughn agreed to transfer to Fey a one-half interest in any patent which he might obtain in the United States upon his said invention.



This agreement is set out in full in the complaint herein, and it is alleged that the defendant failed and refused to advance the money necessary for the patent. There is no allegation of an offer to restore what the plaintiff received from the defendant under the contract, and the prayer of the complaint is that the contract between the parties be annulled.

The defendant's demurrer was overruled, and he answered, denying a breach of said contract on his part and pleading full performance thereof. He also set up as an affirmative defense that the plaintiff had not returned nor offered to return the consideration received from the defendant under the contract. This latter allegation was admitted by the plaintiff upon the trial, and no evidence was offered by him to excuse his failure to place the defendant *in statu quo*. It was further admitted by the plaintiff at the trial that the defendant had supplied the workroom, tools, and equipment for the building of the model, and had expended the sum of ninety-five dollars for materials, equipment, etc., used in the construction of the same; that he had paid to the plaintiff \$100 in weekly payments of twenty dollars each during the period plaintiff was engaged upon the work; that he had advanced the sum of \$230 for the purpose of paying the expense of securing a patent upon the said invention; that, thereafter, the patent office refused to issue one patent covering all the elements of the invention, but insisted upon a "divisional" patent, and that plaintiff, without consultation with defendant, then directed that the money advanced by the defendant be applied to obtaining a patent upon the main device, which patent was duly issued. Plaintiff then asked the defendant for an additional eighty-five dollars to cover the cost of a separate patent upon the device for changing the steel needle. Defendant refused to advance this last-mentioned sum, and the controversy arises over this refusal—it being admitted by the plaintiff that in all other particulars the defendant fully kept and performed all of his obligations under the contract.

The defendant and appellant in support of his allegation of full performance urges that the contract calls for only one patent, and that in advancing the money to secure one

patent defendant fulfilled his part of the contract. However that may be, the admitted facts show that the defendant has expended the sum of \$425, in addition to furnishing shoproom, tools, and equipment for the completion of the model, and the testimony of the defendant is that he expended a larger amount.

Upon these facts, the court decreed an annulment or rescission of the contract, and made no provision in the decree for a return to the defendant of the money which he had parted with under the contract.

The respondent's position is not well taken in seeking to differentiate a suit for the annulment of this contract from a suit for a rescission of a contract. The two words are used interchangeably. (*Haines v. Stilwell*, 5 Cal. Unrep. 27, [40 Pac. 332]; 7 Words & Phrases; Bouvier's Law Dictionary; 1 Black on Rescission and Cancellation, p. 1; Webster's New International Dictionary.)

We have, then, a suit in equity for the rescission of a contract. Without going into the question of whether or not the plaintiff is entitled under the contract to demand from the defendant money to defray the expenses of obtaining a second patent, and conceding for the purpose of a decision of this case that he was so entitled, and that the defendant failed in that particular to fulfill his contract, it is obvious that defendant's breach constituted only a partial failure of consideration. Where a contract is entire, there is a right of rescission thereof for a partial failure of consideration under section 1689 of the Civil Code. (*Sterling v. Gregory*, 149 Cal. 117, [85 Pac. 305].) But it is also stated in said last-mentioned case that the pleadings contained an allegation that everything of value received under the contract had been restored by the party rescinding to the other party. (*Sterling v. Gregory*, *supra*, at p. 118.) It is said in the case of *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677, 683, [34 Pac. 497], that in case of rescission each party to the contract must restore to the other everything of value received and pay for labor performed for him under the contract no matter at whose instance the rescission is made. The decision cites, upon this point, numerous California cases.

In the case of *Bohall v. Diller*, 41 Cal. 532, at pages 535 and 536, it is said: "If a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor in order to work that result to restore to the vendee whatever he has paid on the contract. . . . The plaintiff has failed to allege a repayment or tender of the amount paid by the defendant at the execution of the contract. He, therefore, cannot proceed to recover the possession of the premises on the ground of the rescission of the contract." The language of these various decisions but declares the law as announced in section 1691 of the Civil Code, which expressly provides that rescission when not accomplished by consent can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following rules: ". . . 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise unless the latter is unable or positively refuses to do so." (See, also, *Hammond v. Wallace*, 85 Cal. 522, 531, 532, [20 Am. St. Rep. 239, 24 Pac. 837]; *Buena Vista F. & V. Co. v. Tuohy*, 107 Cal. 243, 255, [40 Pac. 386]; *Hite v. Mercantile Trust Co.*, 156 Cal. 765, 767, [106 Pac. 102]; *Walsh v. Standart*, 174 Cal. 807, 811, [164 Pac. 795]; *Maginess v. West. Securities Corp.*, 38 Cal. App. 56, [175 Pac. 277].)

[1] It seems plain, therefore, conceding that the defendant has partially breached his contract, and that this breach entitles the plaintiff to rescind the same, that, nevertheless, plaintiff may only do so upon returning to the defendant everything of value received by plaintiff from the defendant.

[2] It is idle to urge that because a part of the money was not paid directly to the plaintiff, but to the patent office for the patent, and to the vendors of materials for supplies to be used in completing the model, the plaintiff, therefore, has received nothing which he is obligated to return. The money was paid under the contract for the benefit of the plaintiff and to enable him to perfect his invention, and he accepted the benefits thereof in the way of materials to complete his model and letters patent upon his invention.

The situation is not different in principle from what it would have been had the money been paid to plaintiff personally.

The judgment is reversed.

Nourse, J., and Brittain, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 11, 1920, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on July 12, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 2143. Third Appellate District.—May 14, 1920.]

FLORENCE AGNES SMYTH, Respondent, v. OSCAR FITCH, as Administrator, etc., Defendant; MAJOR S. WILLIAMS et al., Appellants.

- [1] QUIETING TITLE—CAPACITY OF GRANTOR—ORDER OF RESTORATION TO COMPETENCY—EVIDENCE.—In an action to quiet title to real property involving the validity of the deed under which plaintiff claims title, the admission in evidence without objection of an order, made the same day the deed was executed, restoring the grantor to competency, is sufficient to support a finding that she was mentally competent to make such deed.
- [2] ID.—MENTAL COMPETENCY OF GRANTOR—COMPLIANCE WITH CONDITIONS IN DEED—EVIDENCE.—In this action to quiet title to certain real property, in addition to the admission of an order restoring to competency the grantor in the deed under which plaintiff claimed title, there was testimony by other witnesses that such grantor was capable of transacting business and of understanding the nature of the transaction resulting in the execution of said deed; and plaintiff's testimony, which was corroborated by the testimony of other witnesses, was sufficient to support the finding of the trial court that plaintiff complied with and carried out the conditions prescribed in such deed, and upon which the property was conveyed to her.

**APPEAL** from a judgment of the Superior Court of El Dorado County. George H. Thompson, Judge. Affirmed.

The facts are stated in the opinion of the court.

William F. Bray for Appellants.

J. F. Pullen for Respondent.

**BURNETT, J.**—The action was in the usual form to quiet title to certain real property in the county of El Dorado. The appellants herein became parties by a complaint in intervention in which they alleged failure of consideration, fraud, and undue influence on the part of plaintiff in obtaining the deed which she claims, and upon the issues thus raised a trial was had and the findings and judgment were in favor of plaintiff. The appeal was taken under the alternative method, but appellants have not presented in their brief any of the evidence upon which they relied or to which they desired to direct the attention of this court, as required by section 953c of the Code of Civil Procedure. Nevertheless, we have examined the record and are satisfied that, contrary to the contention of appellants, the findings are amply supported and that we would not be justified in disturbing the conclusion of the lower court. We may state the salient facts as follows: Emily Charles, a widow, and mother of eight children, among whom were the plaintiff and the interveners herein, was for many years prior to her death in 1916 the owner of a 160-acre farm in said county. On February 24, 1908, she was declared to be mentally incompetent by the superior court of that county and Manfred J. Williams, a son and one of the appellants herein, was appointed guardian, but never qualified or acted as such. On March 27, 1911, she was restored to competency by said court, Judge Arnot presiding, and a judgment of restoration duly made and entered, from which no appeal has ever been taken. After her restoration, and upon the same day, she made, executed, and delivered to one of her daughters, Florence Agnes Smyth, respondent herein, a deed of said tract of land, wherein she "granted, bargained and sold, conveyed and confirmed" the same to said daughter in con-

sideration of the sum of ten dollars, and also in further consideration of the performance by the grantee of certain conditions, including the constant personal presence of the grantee upon said farm and also the furnishing by her to the grantor of food, clothing, medical attendance, nurse's care, and the defraying of the expense of the last illness, final interment of the grantor after death, said deed providing for reversion in case of a breach. Appellants contend in their brief that the evidence is insufficient to support the finding of the court that the grantor was competent to make such deed and also that the grantee complied with and carried out the conditions therein prescribed.

[1] As to the first of these contentions, the order restoring the grantor to competency, which was admitted in evidence without objection, would be sufficient to support the finding as to her said capacity. [2] Moreover, this was supplemented by the testimony of various witnesses who expressed their opinion that the old lady was capable of transacting business and of understanding the nature of the transaction resulting in the execution of said deed. From the evidence which was thus presented we deem it sufficient to quote from the deposition of C. E. Peters, an attorney at law, as follows: "I saw her on that date [March 11, 1911], in the courtroom of the superior court, El Dorado County, and also at my office. Judge Arnot presided in the superior court. Mrs. Florence Smyth, daughter of Mrs. Charles; Major Williams, son of Mrs. Charles, and possibly Harry Williams and Manfred Williams were present at the session of the superior court, and I was there at that time. After proper proceedings the court made an order restoring Mrs. Charles to mental competency. That was followed by a judgment which was duly entered in the records of the court. After the court proceedings Mrs. Florence Smyth and Mrs. Charles went to my office and a deed was drawn conveying certain property to Mrs. Smyth, and as I remember it, reserving a life interest to Mrs. Charles. I have not seen the deed since it was executed. The deed was acknowledged by Mrs. Charles before Hon. Chas. A. Swisler, Notary Public. I was also satisfied that Mrs. Charles was fully competent, mentally, to execute the instrument. She was quite old at that time, about eighty years, I believe, and she showed keen alertness and understanding. She was es-

pecially practical for a woman of her years, her only hindrance being that she was somewhat deaf. The deed was made by Mrs. Charles without any influence or duress against her of any kind. She did it willingly and voluntarily, stating that she believed it to be the best thing for her to do, considering her circumstances, health and years."

As to the other point, plaintiff herself testified as follows: "Q. You promised and agreed and bound yourself to certain conditions expressed in this deed? A. Yes. Q. Among others to support and maintain the party of the first part as long as she lived and that you should furnish at your expense food, clothing, medical attendance, nurse's care, and the expenses of the last illness—funeral expenses and various other conditions expressed in the deed, you agreed to do that, did you? A. Yes. Q. You did all of that? A. I did. Q. To the best of your ability you complied with all of the conditions of the deed? A. I did. Q. Giving your mother kind attention and care? A. Yes. Q. You have paid for the funeral expenses and erected a monument upon her grave. A. I did. Q. Paid the various expenses of the ranch and taking care of your mother? A. I did." The foregoing evidence would be sufficient, of course, to support the finding of the court as to the said conditions, but we may add that she was corroborated by the testimony of other witnesses.

We think the appeal is without substantial merit and the judgment is affirmed.

Nicol, P. J., *pro tem.*, and Hart, J., concurred.

[Civ. No. 3337. First Appellate District, Division One.—May 14, 1920.]

A. G. RAISCH et al., Respondents, v. GEORGE P. HELFRICH, Defendant; AMERICAN LAND & TRUST COMPANY, Appellant.

- [1] **STREET LAW—FORECLOSURE OF LIEN—PRIVATE CONTRACT—KNOWLEDGE OF VENDOR OF PROPERTY—EVIDENCE—FINDING.**—In this action to foreclose a lien for street work done under a private contract entered into with the vendee in possession under a written installment contract of purchase, the evidence was sufficient to support the finding of the trial court that the vendor of the property, who did not sign the contract to do the street work but whose president and general manager, upon being informed by the street contractors as to such contract and the nature and kind of the intended street work, expressed himself as pleased and said "it was a fine thing to do, to have the street paved with asphalt, and to go ahead and do the work," had knowledge of the work before, at, and during the course of the performance of the contract.
- [2] **ID.—ESTOPPEL—FAILURE TO FILE NOTICE OF NONRESPONSIBILITY—APPLICATION OF CODE SECTION TO STREET WORK.**—By the amendment in 1911 of section 1192 of the Code of Civil Procedure, the legislature extended the statutory estoppel created by that section, on account of the owner's failure to file a notice of nonresponsibility, to street work liens under section 1191 of said code.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. H. Barrows for Appellant.

J. E. Manning for Respondents.

**KOFORD, J., pro tem.**—This is an appeal from a judgment and decree of the superior court foreclosing a lien for street work done under private contract. Plaintiffs, the contractors, secured the signature of defendant Helfrich to a written contract for the street work. Defendant Helfrich, or at least his wife, was at the time in possession under a written installment contract of purchase, under



which the appellant company was selling the lot in question. After obtaining the signature of Helfrich to the street work contract, plaintiffs, at the suggestion of Helfrich, called upon the president and general manager of the appellant company, informing him of the contract with Helfrich and other property owners on the street, and of the nature and kind of the intended street work. The president and manager did not sign the contract, but expressed himself as pleased, and said, "It was a fine thing to do, to have the street paved with asphalt, and to go ahead and do the work."

The street work was thereafter done according to the contract, was accepted, and in due time a notice of claim of lien was duly filed of record. Before this action was tried, the purchaser of the lot, Helfrich, defaulted in his payments, and the appellant retook the lot and became the owner thereof.

The action resulted in a judgment against appellant on the theory of the estoppel created by Code of Civil Procedure, section 1192, namely, on account of the owner's failure to file a notice of nonresponsibility.

[1] Appellant attacks the judgment on two grounds. First, that there was no evidence that it had knowledge that said work *was being done* at any time, but that the evidence only established that it knew the work was going to be done. The finding on this point is that appellant "had knowledge before, at, and during the course of the performance of the contract." We think the evidence sufficient. As was said in *Harmon Lumber Co. v. Brown*, 165 Cal., at page 197, [131 Pac. 368]: "The knowledge which will subject the owner to this burden is not alone actual knowledge. Constructive knowledge, i. e., notice of circumstances which would put a prudent man on inquiry as to the fact in question (Civ. Code, sec. 19), is equally potent to bind the owner" (citing cases).

We think the evidence measures up well to this test.

[2] Appellant next contends that Code of Civil Procedure, section 1192, does not relate to street work. This section, as amended in 1911, reads: "Every building or other improvement or work *mentioned in any of the preceding sections* of this chapter, constructed, altered or re-

paired *upon any land* with the knowledge of the owner," etc.

Appellant draws attention with emphasis to the words "upon any land," and says that street work is not done on the land. He also cites *Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212, [59 Am. St. Rep. 174, 48 Pac. 1097]. This case was decided before Code of Civil Procedure, section 1192, was amended in 1911, and at that time it read, "Every building or other improvement mentioned in section 1183 of this code, constructed upon any land with the knowledge of the owner," etc. It is quite obvious that the legislature by the amendment of 1911, by striking out "mentioned in section 1183 of this code," and inserting "mentioned in any of the preceding sections of this chapter," intended to extend the operation of this statutory estoppel to street work liens under section 1191 of the Code of Civil Procedure. The construction contended for by appellant would violate the express language of the section as amended.

The judgment appealed from is therefore affirmed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1920, a majority of the Justices not having assented to the granting thereof.

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[Crim. No. 711. Second Appellate District, Division One.—May 17, 1920.]

In the Matter of the Proceedings for the Disbarment of  
VERNON CRUICKSHANK, an Attorney and Coun-  
selor at Law.

- [1] ATTORNEY AT LAW—DISBARMENT PROCEEDINGS—CONFLICTING EVIDENCE—APPEAL.—In a proceeding for the disbarment of an attorney at law, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had.

- [2] **ID.—MISAPPROPRIATION OF MONEY—PROOF REQUIRED.**—Section 1110 of the Penal Code, which specifies the character of proof required in order to convict one of false pretenses, is not applicable in a proceeding for the disbarment of an attorney at law based on the misappropriation of money intrusted to him.
- [3] **ID.—EXISTENCE OF PARTNERSHIP—ABSENCE OF DEFENSE.**—The fact that a partnership existed between them would not constitute a defense to a proceeding brought against an attorney at law to have him disbarred for acts constituting moral turpitude in defrauding or misappropriating the money of his partner.
- [4] **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DENIAL OF CONTINUANCE.**—A motion for a new trial on the grounds of newly discovered evidence and of error of the court refusing to granting a continuance that certain evidence might be secured is properly denied, where application for such continuance was not made during the trial of the case and no facts are stated in the affidavit in support of such motion showing the discovery of any new evidence which was not known and accessible to defendant at the time of the trial.
- [5] **ID.—INEFFICIENCY OF COUNSEL—OMISSION TO PROTECT DEFENDANT'S RIGHTS.**—In the absence of a duly authenticated record showing error, the appellate court cannot reverse an order denying a motion for a new trial on the ground that, due to the inefficiency of counsel, defendant omitted the doing of things which he thereafter felt he should have done in protecting his interest at the trial.
- [6] **APPEAL — JUDGMENT — REASONS FOR DECISION — RECORD.**—Reasons stated by a judge in deciding a case are no part of the judgment and have no place in the record, and, therefore, present nothing to be considered in reviewing a judgment on appeal therefrom.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Affirmed.

The facts are stated in the opinion of the court.

Henry G. Bodkin for Appellant.

Frank F. Oster for Respondent.

**SHAW, J.**—The trial of defendant, an attorney at law, upon an accusation filed by the Los Angeles Bar Association charging him with the commission of acts involving moral turpitude, resulted in a judgment of disbarment, from which, and an order overruling his motion for a new trial, he appeals.

The gist of the accusation is that appellant obtained from Henry Goetz the sum of ten thousand dollars upon the representation that the same would not be used otherwise than in the construction and equipment of a certain plant and patented process for extracting ore from the black sands of certain lands located near Watsonville, California, wherein he and one J. R. Ghiselin owned a controlling interest; that instead of using the money for such purpose, he divided the same between himself and Ghiselin, both of whom appropriated the money to their own uses. That such was the theory adopted by the trial court conclusively appears from this statement made in the course of the trial, wherein the judge said: "The only issue is what this money was going to be used for. All they claim is that they said the money was not used for what Mr. Cruickshank said it was going to be used. . . . That is all I am going to try. . . . The question is whether he [Cruickshank] represented that it would be used for a certain purpose and did not use it for that purpose. That is all there is, and that is all the complaint states."

While the evidence is to some extent conflicting, that of Goetz, which the court accepted as true, tends to show the following facts: That he and appellant had for many years been intimately acquainted and the latter had from time to time acted as his attorney in certain matters. In September, 1917, he, at the request of appellant, called at the latter's office, when appellant told him he had a proposition that was going to make lots of money; that he, with Ghiselin, was interested to the extent of seventy per cent in a patented process to separate iron ore from black sand upon which they had an option, and needed ten thousand dollars toward putting up the plant. Goetz said he did not want to gamble, but could let him have the money, provided his banker approved, to which Mr. Ghiselin, who was present, replied: "We are not going to give our secrets away." Whereupon Goetz said: "That lets me out," to which a Mrs. Thorkildsen, who was present, replied: "Well, all right, I will put up the money." Thereupon Goetz left the office, followed by appellant, who expressed his friendship for the former and the fact that there were tremendous profits in the proposition, and that, notwithstanding Mrs. Thorkildsen was going to put up ten thousand dollars, which

he thought sufficient for the purpose, nevertheless they should have the additional money on hand for use as an emergency fund, since other money might be needed to complete the plant and its equipment; and hence it was desired that they be prepared with money for such purpose, and that if the money so advanced by Mrs. Thorkildsen was insufficient for the purpose, then and only in such case would his money be used therefor. Meanwhile he was assured the money was to be deposited and kept in bank. Goetz visited the property in company with appellant and Ghiselin, at which time he was cautioned by appellant and Ghiselin not to talk about the business in the presence of others, and by their acts and representations he was favorably impressed with the merits of the proposition. Upon returning to Los Angeles Goetz was shown certain photographs of the proposed plant, tending to convince him that the plant could be erected for the money obtained from Mrs. Thorkildsen, and on September 21, 1917, when Goetz gave the check, appellant, in his office, said to him: "Henry, we don't really need your money. I have money in the safe, ten thousand dollars, but I will not use that money [represented by the Goetz check] for any other purpose than what it is intended for." Whereupon Ghiselin got up and pulled out the drawer in the safe and showed him the money. In delivering the check, Goetz said to appellant that he did not want Ghiselin to have anything to do with it, and stated: "Now, Vernon, here is my check, hoping and trusting that everything you told me is nothing but the truth." He had full confidence in the appellant and advanced the money to him, believing that it would be kept in the bank at Watsonville and only used in case the money obtained from Mrs. Thorkildsen was insufficient to erect the plant, in which case the money so advanced would be used toward such purpose; otherwise returned to him. Goetz obtained the money by borrowing it from his bank, appellant agreeing to reimburse him for such rate of interest as he was compelled to pay therefor, and voluntarily, it seems, proposed giving him a contract for a five per cent interest in that of appellant and Ghiselin, similar to one which appellant said they were giving to Mrs. Thorkildsen. This receipt recited that Goetz had loaned them ten thousand dollars, in consideration of which they conveyed to

him a five per cent interest in the option therein described and in certain alleged patent rights in the machine to separate iron and steel from the black sands therein mentioned. No part of the money so advanced went into the construction of any plant or process, but upon receiving it appellant gave one-half thereof to Ghiselin, and the former used a part of his share in a trip to New York, made for the purpose, as claimed by him, of financing the black-sand proposition. There is much other evidence touching the question, but that referred to tends to show that appellant and Ghiselin engaged in a dishonest scheme to obtain the ten thousand dollars from Goetz and did not intend to use it toward the completion of the proposed plant, but did at the time intend to appropriate it to their own use, and thus by deceiving Goetz he was fraudulently induced to advance the money, no part of which, other than one thousand six hundred dollars, did he collect.

[1] Appellant insists that a proceeding for disbarment is criminal in character, and therefore the proof, as in the trial of a criminal case, must show the defendant to be guilty as charged beyond a reasonable doubt, and insists that, notwithstanding the testimony of Goetz, it does not, when considered with testimony offered by defendant, establish a case justifying his disbarment, in support of which he cites a number of authorities from other jurisdictions. What was said by the supreme court, in answering a like contention (*In re Morton*, 179 Cal. 510, [177 Pac. 453]), is appropriate here: "Basing his contention upon the fact that a proceeding for the disbarment of an attorney is in the nature of a criminal proceeding (*In re Alameda County Bar Assn.*, 35 Cal. App. 534, [170 Pac. 432]), counsel insists that, to warrant disbarment, the evidence, like that required to justify a verdict of guilty in a criminal case, must be clear, positive, and such as to establish both the motive and commission of the act charged beyond a reasonable doubt. In support of this proposition he cites a number of authorities from other jurisdictions, an examination of which, however, shows that none of them involved cases on appeal where the court was called upon to review the sufficiency of the evidence in support of the finding, but what was said therein related to proceedings of disbarment over which the court, in some of the cases having recourse

to a referee in the taking of the evidence, assumed original jurisdiction, acting as a trial court, as *In re Houghton*, 67 Cal. 511, [8 Pac. 52]. None of them constitute authority for appellant's claim, when applied to a court charged with the duty of reviewing the testimony, but do announce the rule that in such cases the accused should not be convicted unless the trial court is convinced, by clear and satisfactory evidence, or, as said in some cases, beyond a reasonable doubt, of his guilt. However this may be, this court, in a like case involving a like question (*Matter of Danford*, 157 Cal. 425, [108 Pac. 322]), has, in effect, held that in disbarment proceedings, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but that such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had." Hence, since the trial court in the exercise of its function believed the testimony of Goetz, and, though conceding its denial on the part of defendant, we cannot say the evidence was insufficient to justify the implied finding of the court that defendant was guilty of acts constituting moral turpitude, which is anything done contrary to justice or honesty and with the purpose of defrauding another, regardless of whether such acts rise to the dignity of a crime. (*In re Disbarment of Coffey*, 123 Cal. 522, [56 Pac. 448]; *In re Kirby*, 10 S. D. 322, [39 L. R. A. 856, 73 N. W. 92].) On the contrary, we hold appellant's contention in this regard to be without merit.

[2] "Neither is there any merit in the contention that section 1110 of the Penal Code, which specifies the character of proof required in order to convict one of false pretenses, is applicable to a case of this character.

Another argument made by appellant is that there existed between appellant, Goetz, and Ghiselin the relationship of copartners. This is based upon the fact that appellant and Ghiselin conveyed to Goetz five per cent interest in their option. We are unable to perceive any merit in the contention. [3] But conceding the existence of the copartnership, such fact would not constitute any defense to a proceeding brought against an attorney for acts constituting moral turpitude in defrauding his partner.

[4] In support of a motion for a new trial made by defendant, he filed an affidavit wherein it is alleged that the

court abused its discretion in (a) denying a few minutes continuance of the case to allow appellant to secure the evidence of the president of the Bar Association as to the alleged fact that Goetz had exonerated appellant from any misconduct; (b) that an affidavit by complainant exonerating appellant was in the possession of the secretary of the Bar Association; (c) that after the alleged misconduct of appellant he acted as attorney for Goetz; (d) that prior to the disbarment proceeding Goetz sued appellant and Ghiselin and in his complaint and testimony offered at the trial made statements inconsistent with his testimony given in this proceeding; (e) that the disbarment citation was returnable October 9, 1918, and the case was tried October 15, 1918, over the objection of appellant, during which time appellant's counsel was sick and appellant unskilled in the trial of a lawsuit and therefore unable to present a proper defense. As to all of these and other like contentions, a sufficient answer thereto is that the record discloses no such applications made during the trial of the case, and no facts are stated in the affidavit showing the discovery of any new evidence which was not known and accessible to the defendant at the time of the trial. [5] There is nothing in the record showing that defendant, when the case was set down for trial, made any objection thereto upon the ground that the time was too short for him to prepare his defense, or that he asked for continuance in order to produce the evidence of the president of the Bar Association. On the contrary, the effect of the affidavit is to merely show that defendant omitted the doing of things which he thereafter felt that he should have done in protecting his interest at the trial. It may be, as suggested by appellant, that such omissions were due to the inefficiency of counsel then appearing for him; but the court cannot, in the absence of a duly authenticated record showing error, reverse an order upon such ground.

At the close of the trial the court in rendering its judgment, said: "I realize the seriousness of disbarring an attorney, but the accused is not doing a very substantial amount of law practice, according to his own statements, and there would not be much damage done by disbarring him." [6] It has been repeatedly held that the reasons stated by a judge in deciding a case are no part of the judg-



ment and have no place in the record, and hence present nothing to be considered in reviewing a judgment on appeal therefrom. However, we may say that in arriving at its decision we cannot believe the trial court was in the slightest degree influenced by the limited extent of defendant's law practice.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

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[Crim. No. 885. First Appellate District, Division Two.—May 17, 1920.]

**THE PEOPLE, Respondent, v. FLORENCE W. BLISS,  
Appellant.**

- [1] **CRIMINAL LAW—FAILURE OF INFORMATION TO CHARGE PUBLIC OFFENSE—MOTION IN ARREST OF JUDGMENT.**—The objection that an information does not state facts sufficient to constitute a public offense is not waived by a failure to demur, but may be raised by a motion in arrest of judgment.
- [2] **ID.—OBTAINING MONEY UNDER FALSE PRETENSES—INDUCEMENT TO PART WITH PROPERTY.**—In charging the crime of obtaining money under false pretenses, the false pretenses must be a material element in inducing the prosecuting witness to part with his money or property.
- [3] **ID.—RECEIPT OF CONSIDERATION PROMISED—PRESUMPTION—OTHER REPRESENTATIONS IMMATERIAL.**—Where an information charging defendant with obtaining money under false pretenses fails to allege that the prosecuting witness did not receive from defendant everything that the latter agreed to give in consideration for the money of the former, there can be no presumption that he did not receive these things, and the information is insufficient to charge a public offense on the part of defendant, notwithstanding it charges the latter with knowingly making false and untrue representations as to numerous other matters.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a motion in arrest of judgment. A. F. St. Sure, Judge. Reversed.

The facts are stated in the opinion of the court.

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2. Extent to which false pretenses must be calculated to deceive in order to be indictable, note, 7 *Ann. Cas.* 32.

J. R. Cunnyingham, H. H. McPike and Gilbert L. Jones  
for Appellant.

U. S. Webb, Attorney-General, and John R. Riordan,  
Deputy Attorney-General, for Respondent.

LANGDON, P. J.—This is an appeal by the defendant from a judgment of conviction of the crime of obtaining money under false pretenses, and also from an order denying defendant's motion in arrest of judgment. There are a number of grounds of appeal enumerated in the notice of appeal, but the appellant urges upon our attention but one of these matters, and as this objection, in our opinion, is decisive of the case, it will be unnecessary to discuss any of the others.

[1] The objection is that the information fails in two respects to state facts sufficient to constitute a public offense—first, because no causal connection is shown or can be inferred between the representations alleged to be false and the parting with the money; and, second, because the information fails to allege facts showing that the complaining witness, Lansdale, was defrauded.

The objection to the information is a matter of substance and not of form and was not waived by a failure to demur and was properly raised by the motion in arrest of judgment. (Pen. Code, secs. 1004, 1012, 1185; *People v. Ross*, 103 Cal. 425, 428, [37 Pac. 379]; *People v. Smith*, 103 Cal. 563, 566, [37 Pac. 516]; *People v. McKenna*, 81 Cal. 158, [22 Pac. 488].)

The information alleges that the defendant made certain representations to W. R. Lansdale with fraudulent intent. The representations are then set out. In the brief filed on behalf of the state these allegations are summarized as follows:

"1. That defendant was the owner of a valuable mine in the state of Nevada known as the Lucky Girl group of mines;

"2. That said mines were of the value of one hundred thousand dollars.

"3. That defendant had on deposit in the Central National Bank of Oakland four thousand seven hundred dollars;

"4. That defendant had on deposit in said bank twenty-five thousand dollars to her credit as executrix and sole legatee of the McIntyre estate;

"5. That defendant was worth over one million dollars and was the owner of property in New York of the value of over one million dollars;

"6. That defendant was the owner of ten sections of wheat land near Alberta, Canada, worth over one million dollars;

"7. That defendant owned two large hotels, seventeen granaries and a traction engine all situate near Alberta, Canada;

"8. That defendant had left Canada because that country had gone dry and she was compelled to close the bars of the hotels;

"9. That defendant received an income of six thousand five hundred dollars payable every forty days;

"10. That she had given instructions to the Canadian Bank of Commerce to transfer all money on deposit with said bank, amounting to the sum of six thousand five hundred dollars, to the Elko National Bank, Nevada, and that said sum would be on deposit to her credit January 1, 1918;

"11. That she had discharged her attorney and that he had attached and garnished her money in the sum of four thousand seven hundred dollars on deposit in the Central National Bank of Oakland, and that she was thereby prevented from withdrawing any part thereof."

It is then alleged that these representations, with the exception of the first and second, are false and untrue. Then follows an allegation that the defendant knew the representations were untrue, and that Lansdale, believing said representations, and being deceived thereby, was induced by reason thereof to enter into a certain agreement. The terms of the agreement are then specified, and they are that the defendant would hire and employ said Lansdale and his wife and son at specified salaries at the Lucky Girl group of mines, and that the defendant would sell and convey to said Lansdale an undivided one-third interest in said group of mines. In consideration of this agreement, said Lansdale paid the defendant three hundred dollars. It is alleged that Lansdale "in pursuance of said promises, representations and agreements so made by said Florence W. Bliss, and being deceived thereby, did then and there pay

over and deliver to the said Florence W. Bliss the sum of three hundred dollars." There is no direct allegation, nor any allegations from which it might be inferred, that the defendant did not own the Lucky Girl group of mines; that they were not worth one hundred thousand dollars; that Lansdale and his wife and son were not employed by the defendant, and that they did not get a one-third interest in the said mine.

It seems clear, therefore, that there is no causal connection shown between the allegations alleged to be false and the parting with the three hundred dollars by Lansdale. [2] It is a well-settled rule that in charging the crime of obtaining money under false pretenses, the false pretenses must be a material element in inducing the prosecuting witness to part with his money or property. (*People v. Kahler*, 26 Cal. App. 449, [147 Pac. 228]; *People v. Haas*, 28 Cal. App. 182, [151 Pac. 672]; *People v. Canfield*, 28 Cal. App. 792, [154 Pac. 33].)

It is contended by the respondent that this case fairly falls within the rule of the case of *People v. Griesheimer*, 176 Cal. 44, [167 Pac. 521]. In that case it is said: "While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations and for the purpose suggested thereby."

In the present case it not only does not appear by necessary or even possible inference that the money was paid because of the representations which are alleged to have been false, but it is expressly charged in the information that the money was paid for a specific purpose, i. e., in consideration of a promise to give to Lansdale a one-third interest in a valuable gold mine owned by defendant, and in further consideration of the promise by the defendant to

employ Lansdale and his family at that mine. It is apparent that if one is purchasing an interest in a mine and securing employment therein—an inducing representation would be as to the ownership and value of the mine. It is clear that the representations concerning these facts were the inducing cause for the parting with the money, and these representations are not alleged to have been false. The only representations alleged to have been false are representations totally disconnected with the purpose for which Lansdale parted with his money. A similar question is presented in the case of *People v. Kahler, supra*; indeed, that case seems to present a legal situation closely analogous to the one here. That case is discussed and approved in the case of *People v. Canfield, supra*.

In the Kahler case it is said: "While not alleged, it is no doubt true that Cogan was induced to buy the drums and traps in reliance upon defendant's promise to give his son musical instruction, and to secure him employment as soon as he was sufficiently proficient. It was this promise which induced the prosecutor to deal with him and not the representation of existing facts in reliance upon the truth of which Cogan believed that defendant would fulfill his promise." So, in the present case, it was the promise to convey a one-third interest in the mine and to employ the prosecutor and his family which caused him to enter into the agreement with the defendant and to part with his money, and not the representations of existing facts as to defendant's wealth, which latter may have given the prosecutor additional reason to believe that the defendant would fulfill her agreement, but were not the consideration upon which he parted with his property.

[3] Furthermore, the information fails to allege facts showing that Lansdale was defrauded. There is no allegation that Lansdale did not receive from the defendant just what it is alleged she agreed to give him—a one-third interest in this mine and employment for himself and family. There can be no presumption that Lansdale did not receive these things, in the absence of an allegation to that effect, and if he received what defendant had agreed to give him, there would be no offense on the part of the defendant. (*People v. Tufts*, 167 Cal. 266, 270, [139 Pac. 78].) It is clearly apparent that if defendant did own the mine, which

was of the value claimed, and did give to Lansdale a one-third interest therein, and employment for himself and family, it would be immaterial in a criminal inquiry whether or not she falsely represented that she owned in addition thereto a million dollars' worth of real property in Canada and a million dollars' worth of real property in New York, or all the wealth of the Aztecs, as Lansdale was not led to believe that he would be entitled to any interest in any property except the mine.

The motion in arrest of judgment should have been granted, as the information was insufficient to charge a public offense.

The judgment is reversed.

Brittain, J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 16, 1920, a majority of the Justices not having assented to the granting thereof.

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[Civ. No. 2053. Third Appellate District.—May 17, 1920.]

ENNIS-BROWN COMPANY (a Corporation), Respondent,  
v. RICHDALE LAND COMPANY (a Corporation),  
Appellant.

[1] DEPOSIT—ADVANCEMENT ON PURCHASE PRICE OF CROP—ACCEPTANCE BY MORTGAGEE—LIABILITY FOR REPAYMENT OF EXCESS.—Where an advancement on the purchase price of a growing crop is paid to the holder of a mortgage on the crop with the direction that the money be applied to the purchase of said crop, and the mortgagee acknowledged receipt of the money for that purpose, such mortgagee becomes a voluntary depository, within the meaning of section 1814 of the Civil Code, of the excess of the amount thus advanced over the amount needed for the purchase of the crop and is under a duty to return such residue to the depositor.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge. Affirmed.

The facts are stated in the opinion of the court.

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J. Oscar Goldstein for Appellant.

V. L. Hatfield and W. H. Hatfield for Respondent.

BURNETT, J.—September 14, 1917, the Ennis-Brown Company entered into a contract with W. B. Linn & Son whereby the former agreed to purchase the Egyptian corn growing upon the land occupied by the latter and owned by them. The agreed price was fifty dollars per ton, "free on board boat," and it was stipulated that an advance payment of \$4,500 should be made. At the time the crop was estimated at 320 tons, but it actually yielded 115,013 pounds, amounting at said price to the sum of \$2,875.30. Plaintiff having advanced said sum of \$4,500 was therefore entitled to the return of \$1,624.70. The question in the case is whether the cause of action in favor of plaintiff for this amount is legally against said Linn & Son or defendant Richvale Land Company. On September 27, 1917, defendant wrote plaintiff stating in effect that the former understood that the latter had purchased the corn crop of Linn & Son and that said Richvale Land Company had a crop mortgage on said crop and would expect any advancement of the price to be made to said company. On October 1, 1917, plaintiff, not referring to defendant's letter of September 27th, wrote defendant as follows:

"Richvale Land Company,

"Chico, California,

"Gentlemen:

"As per instructions from Mr. Axtell, we herewith enclose you our check of \$4,500 to apply on purchase price of Egyptian Corn bought from W. B. Linn & Son. Kindly have Mr. Linn endorse check in your favor and this will keep the record straight at your end. Please acknowledge receipt of the check and oblige.

"Very truly,

"ENNIS-BROWN COMPANY."

The next day defendant answered the letter, as follows:

"We acknowledge receipt of your check for \$4,500 to apply on purchase of Egyptian Corn from W. B. Linn & Son. Mr. Linn will begin to thresh the first of next week.

"Very truly,

"RICHVALE LAND COMPANY."

The foregoing correspondence shows the foundation for plaintiff's claim against defendant for the balance remaining after the purchase price of said corn was paid.

We appreciate all that has been said by appellant as to the essentials of a contract. Of course, the parties must agree upon its terms before it becomes a legal and binding obligation. A proposition made by one party but not assented to by the other is of no avail. These elementary principles need no discussion, but we are entirely satisfied that appellant has made a wrong application of them. We may admit that the parties herein might have adopted more apt language to express their intention; at least, they could have been more definite and explicit, but we must not expect such precision and accuracy as would characterize formal instruments deliberately prepared by a capable attorney. [1] However, by fair intendment and common understanding of the terms employed, the letter and the reply being considered together, the correspondence amounts to this: Plaintiff, having sent to defendant the sum of \$4,500, directs that it be applied to a single and definite purpose, namely, the "purchase of Egyptian Corn bought from W. B. Linn & Son." There was no uncertainty therein. It was understood what purchase was referred to and what price was to be paid. This direction, of course, excluded the application of the money to any other purpose. This is according to a familiar rule of logic. The direction would not have been changed in effect if the plaintiff had directed that the money be applied "on the purchase of said corn *and used for no other purpose.*" The defendant accepted the money and agreed to use it for that purpose. It is true that there was no express declaration that "we agree to apply the money to that purpose," but this is necessarily implied in the statement, "We acknowledge receipt of your check for \$4,500 *to apply on purchase of Egyptian Corn from W. B. Linn & Son.*" Would the case for plaintiff be any stronger if defendant had written: "We acknowledge receipt of your check for \$4,500 and we will apply it on the purchase of Egyptian Corn from W. B. Linn & Son"? The acceptance of the money for a definite purpose carries the implication that it would be used for that purpose. This seems too plain to require argument. The money, therefore, having been accepted for a definite and specific object, and the purpose



having been accomplished, what is the obligation of the defendant as to the residue, which was not needed for the purchase of the corn? There can hardly be any difference of opinion as to that question. The residue belonged to plaintiff, and it was the legal and moral duty of defendant to return it to the owner.

We need not quibble as to the proper legal terminology to characterize the relation of the parties. In a general sense, though, it is proper to say that a trust was created by express agreement, and it imposed upon defendant the obligation to pursue the course we have indicated. More specifically stated, the Richvale Land Company became a voluntary depositary within the meaning of section 1814 of the Civil Code, providing: "A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary."

As to the use to which the deposit may be put, necessarily the will of the depositor controls. However, the legislature, in section 1835 of the Civil Code, has recognized this limitation in the following language: "A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor." Herein the only consent granted by plaintiff to defendant was to apply the money "on the purchase of Egyptian corn bought from W. B. Linn & Son." The depositary, therefore, had authority to use it for no other purpose.

Appellant makes the mistake of supposing that the case involves a *general* deposit, whereas, we are dealing with a *special* deposit. It is special because it was limited to a specific and definite purpose. The title did not pass to defendant as it would have done if the deposit had been general in its nature. The deposit constituted a bailment with the title remaining in the bailor and the bailee acquired no right to make general use of the property. The distinction between the two kinds of deposits is clearly pointed out in *Anderson v. Pacific Bank*, 112 Cal. 601, [53 Am. St. Rep. 228, 32 L. R. A. 479, 44 Pac. 1063], and *People v. California etc. Trust Co.*, 23 Cal. App. 199, [137 Pac. 1111, 1115].

Appellant also claims that the trial court erred in allowing interest from October 31, 1917, instead of January 25, 1918,

when the demand was made for the payment of the residue. No doubt the general rule as to interest on deposits is correctly stated in *Anderson v. Pacific Bank, supra*, and *Barrere v. Somps*, 113 Cal. 97, [45 Pac. 177, 572], wherein it is held that interest is allowable from the date of demand. Herein, however, the court found on sufficient evidence that there was an actual conversion of the money on said October 31st; and section 3336 of the Civil Code permits the recovery of the interest from that time. Moreover, we are not furnished with a copy of the pleadings upon which the action was tried and we must assume that no issue was tendered as to this point. Indeed, we might go further in the assumption that it was admitted in the answer that a demand was made on said October 31st. It may be added that the reduction of the amount recovered would be inconsiderable if effect were to be given to appellant's contention in this respect.

The judgment is affirmed.

Nicol, P. J., *pro tem.*, and Hart, J., concurred.

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[Civ. No. 3226. First Appellate District, Division Two.—May 17, 1920.]

HERMAN O. RUMETSCH, Respondent, v. JOHN L. DAVIE et al., Appellants.

- [1] MUNICIPAL CORPORATIONS—OAKLAND—PENSION OF RETIRED CORPORAL—BASIS OF COMPUTATION.—Under section 95 of the charter of the city of Oakland, a retired corporal of police, who has held that rank one year prior to his retirement, is entitled to an annual pension equal to one-half the salary he would receive as a corporal if he were restored to actual service, and not one-half the salary he received one year prior to his retirement.
- [2] STATUTORY CONSTRUCTION—DUTY OF COURTS.—It is the duty of the courts to interpret statutes in such a manner that they may be free from ambiguity, and not to be ingenious to find ambiguities in them because of extraneous matters, nor is it their duty to assume the function of the law-making power.

APPEAL from a judgment of the Superior Court of Alameda County. A. F. St. Sure, Judge. Affirmed.

• The facts are stated in the opinion of the court.

H. L. Hagan, City Attorney, and Leon E. Gray, Deputy City Attorney, for Appellants.

Fitzgerald, Abbott & Beardsley for Respondent.

BRITTAİN, J.—The defendants appeal from a judgment awarding the plaintiff a peremptory writ of mandate in effect directing them to approve his claim as a retired corporal of police in the city of Oakland for one-half the amount of salary attached to the rank he had held for one year prior to his retirement. The facts are admitted, and the only question to be determined is whether the respondent is entitled to pension computed on a basis of the salary he was receiving at the date of retirement or that which he was receiving one year prior to retirement.

The charter of the city of Oakland was adopted in 1911. By section 91 it was provided that "the officers and members of the police department shall receive as annual compensations . . . Corporals—\$1,500 . . . Said compensations shall be paid in equal monthly installments. No compensation higher than those herein specified shall be paid to any officer. . . ."

Section 95 was as follows: "Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty, upon his filing with the board of trustees a verified petition, setting forth the facts constituting such disability, and the cause thereof, accompanied by a certificate signed by the chief of police, the captain of the division to which he belongs, and by two regularly licensed physicians of the city, recommending his retirement upon a pension, on account of such disability, may be retired from the department upon an annual pension, equal to one-half the amount of salary attached to the rank which he held one year prior to the date of such retirement, to be paid to him during his life, and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement."

Under these provisions when an officer who had held the rank of corporal for one year prior to his retirement was retired, he was paid one-half the amount of salary attached to the rank at the date of his retirement. Since that was

the salary attached to the rank one year prior to the retirement, it was also equal to one-half the salary attached to the rank at that time. The language of the section was in no sense ambiguous or uncertain.

In 1919 the people of Oakland amended section 91 of the charter, and it became effective on the approval of the legislature on January 17, 1919. As amended, it provided that "the officers and members of the police department shall receive annual compensations comprising their salaries of not less than . . . Corporals—\$1,620 . . . Said compensations shall be paid in equal monthly installments. . . .

"No other or further deduction shall be made from the pay of any officer or member of the department for any fund or purpose unless the same is authorized by this charter.

"No compensation or salary less than those herein specified shall be paid to any officer or member of the police department . . ."

[1] The respondent held the rank of corporal on April 1, 1918, and on April 1, 1919, the appellants, constituting the board of trustees, adopted a resolution by which he was retired on account of physical disability received in the performance of his duty as corporal. Under the terms of the charter his salary is payable to him quarterly. The first payment on July, 1919, was made on the basis of a salary of \$1,500. He presented a claim for the second quarter on the basis of salary at \$1,620, plus the ratable shortage on the first payment. The appellants refused to allow the claim on the sole ground that the petitioner was entitled only to the salary attached to the rank of corporal one year prior to the date of retirement.

Under section 95, if the disability is removed, the pension will cease, and the respondent will be restored to the service in the rank he occupied at the date of his retirement. If he should be so restored, under the provisions of section 91, as amended, he will immediately be entitled to salary at the rate of \$1,620 a year. While he is on the retired list, it would seem to be entirely consistent with the language, as well as the purpose, of section 95, that he should receive as pension one-half the amount he would receive as a corporal if on active service. This court has no hesitation in determining that the amount of the pension is fixed by the

salary attached to the rank of the retired man at the time of retirement, provided he held that rank for the period of one year prior to the date of retirement. If, in amending section 91, the people of Oakland had intended to change the plain and unambiguous meaning of section 95, without doubt they would have in terms amended the section. The amendment of section 91 did not serve to import an ambiguity into section 95, which had theretofore been free from uncertainty. [2] It is the duty of the courts to interpret statutes in such a manner that they may be free from ambiguity, and not to be ingenious to find ambiguities in them because of extraneous matters, nor is it their duty to assume the function of the law-making power. Section 95 cannot be given the construction contended for by the appellants without amending it by interpolating a clause limiting its effect and changing its clear meaning. The conclusion reached coincides with the rule adopted in the city and county of San Francisco upon a similar provision of its charter. (Opinions City Attorney, Percy V. Long, January 20, 1908.) The judgment is affirmed.

Nourse, J., and Langdon, P. J., concurred.

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[Civ. No. 2956. Second Appellate District, Division One.—May 18, 1920.]

M. J. BHUMGARA et al., Respondents, v. J. GAZVINI, Appellant.

[1] CONVERSION — PLEADING — AMENDMENT AT TRIAL — ADDITION OF PARTY PLAINTIFF—ABSENCE OF PREJUDICE.—In an action to recover the value of certain goods, wares, and merchandise alleged to have been converted by the defendant to his own use, the defendant is not prejudiced by the action of the court in granting plaintiff leave at the trial to amend his complaint by adding another party plaintiff, where the defendant does not object to the amendment at the time and does not accept the court's offer to allow further time to answer, and, at his suggestion, it is stipulated by plaintiffs that if his defense is good against either one of the plaintiffs, it is good against both.

**[2] ID.—RECEIPT AND CONVERSION OF PROPERTY—EVIDENCE—FINDINGS.**

In this action to recover the value of certain goods, wares, and merchandise alleged to have been converted by the defendant to his own use, although some of the evidence was circumstantial, there was sufficient evidence to sustain the findings of the trial court as to the receipt of plaintiffs' goods by defendant and their alleged conversion.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

C. Ibeson Sweet and W. D. Van Nostran for Appellant.

W. R. Law for Respondents.

**JAMES, J.**—Plaintiff M. J. Bhumgara sued to recover an amount of money alleged to be the value of certain goods, wares, and merchandise. The property is asserted to have been converted by the defendant to his own use. Judgment was in favor of plaintiff and defendant appeals therefrom. An appeal was also attempted to be taken from an order denying a motion for new trial, but under the code provision in force at the time that motion was made and ruled upon, no separate appeal was authorized to be taken from the order. (Code Civ. Proc., sec. 963.)

[1] At the trial the plaintiff asked and obtained leave to amend his complaint by adding the name of J. S. Bhumgara as party plaintiff. Appellant now claims that the granting of this permission was error. An examination of the record shows that appellant did not object to the amendment at the time. It is shown that the court offered to allow further time to answer, if appellant desired it, after the amendment adding the name of the party was made, but that appellant's counsel replied that he did not care for any time, and, at his suggestion, it was stipulated by respondent that "if the defense is good against either one it is good against both." We cannot perceive how in the slightest degree the appellant was prejudiced by the amendment.

[2] The only other claim is that the evidence was insufficient to sustain the findings of the court as to the receipt of plaintiffs' goods by defendant and their alleged con-

version. We have examined the transcript of the evidence with much care and, without entering into a detailed statement of the testimony, we consider that the evidence was sufficient to fully sustain the findings. Some of the evidence was circumstantial, but it was none the less competent and material. It was for the trial court to determine whether plaintiffs produced the preponderance of evidence, and its decision, in the presence of a conflict, is final as to the facts.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Crim. No. 913. First Appellate District, Division Two.—May 18, 1920.]

In the Matter of the Application of HAZEL BAYLES for  
a Writ of Habeas Corpus.

[1] APARTMENT-HOUSE KEEPER—WITHHOLDING POSSESSION OF TENANT'S PROPERTY—DISPUTED CLAIM—LARCENY.—Where the person renting a furnished apartment undertakes and agrees to leave the apartment "clean" upon vacating it, or to pay for cleaning the same, and agrees that the owner should have a lien upon his personal property for all unpaid charges under the agreement between them, and, upon the vacating of the apartment, a dispute arises as to whether the apartment is clean, the owner cannot be held for larceny for withholding possession of property of the tenant until the dispute between them can be legally determined. Felonious intent is an essence of the crime of larceny.

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1. Intent essential to crime of larceny, note, 51 Am. Rep. 312.

Larceny or embezzlement as affected by belief in right to property taken, note, 41 L. R. A. (N. S.) 549.

Larceny as affected by purpose to take or retain property in payment of or as security for, a claim, note, 13 A. L. R. 142.

APPLICATION for a Writ of Habeas Corpus to secure the release of a person held to answer to the superior court upon a charge of grand larceny. Petitioner discharged.

The facts are stated in the opinion of the court.

C. F. Adams for Petitioner.

Matthew Brady, District Attorney, and Leo. R. Friedman, Deputy District Attorney, for Respondent.

LANGDON, P. J.—This case comes to us upon a petition for a writ of *habeas corpus*. The petition alleges that the petitioner is and was at all times mentioned therein the owner and manager of a certain furnished apartment house in San Francisco; that the prosecuting witness, P. Tucker, rented an apartment in said house; that at the request of said Tucker, petitioner furnished gas and electricity to him from February 16, 1920, to March 31, 1920; that at the time of renting said apartment, Tucker signed a receipt, agreeing to the terms and conditions set forth on the back thereof, one of which was that the price of gas and electricity should be charged for in addition to the price agreed upon as the rental of the apartment. Another one of the terms and conditions contained in said agreement attached to the petition is as follows: "I . . . also agree to leave the said apartment, the linen and bedding therein, clean and in good condition, or to pay the charges for cleaning and laundering the same; if said rent or any part thereof, or any charge hereunder, remain unpaid after the same becomes due, according to the terms hereof, or if any obligation hereunder remains unperformed," the owner may remove the personal property of the tenant and after three months may sell the same at public auction, etc. It is alleged in the petition that the apartment was vacated by Tucker on March 31, 1920, and was not left clean, and that petitioner was obliged to clean the same; that petitioner charged Tucker three dollars for cleaning said apartment; also a blanket and comforter used by Tucker in said apartment were left soiled, and a charge of \$1.50 was made by petitioner for cleaning the same, which charges Tucker refused to pay; that the petitioner on said thirty-first day of March did take and



carry away one sewing-machine and one victrola of the value of \$225, the property of said Tucker, and refused to permit said Tucker to have the same, and claimed to hold said property for a lien of \$9.75, which amount included the charge for gas and electricity, breakage of chinaware, etc., cleaning of linens, blankets, etc., and the charge of three dollars for cleaning of the apartment. Upon April 2, 1920, Tucker swore to a complaint in the police court of the city and county of San Francisco, charging petitioner with the crime of grand larceny. A warrant was issued upon said complaint, and on April 5th petitioner was arrested. The hearing came on regularly on April 21, 1920, and upon said hearing the judge of the police court made an order holding the defendant to answer to the superior court upon the charge. Petitioner contends that the testimony before the committing magistrate shows no reasonable, probable, or lawful cause for holding her to answer to the superior court for the offense of grand larceny. The precise contention of petitioner is that the transcript of the testimony shows no felonious intent upon her part.

The testimony in the police court shows that Tucker offered to pay the charges for gas and electricity, breakage, etc., and refused to pay only the charges for cleaning the apartment. The first question presented, therefore, is whether or not petitioner had a lien upon the property for this charge. Section 1861a of the Civil Code provides: "Keepers of furnished apartment houses shall have a lien upon the baggage and other property of value belonging to their tenants or guests, which may be in such furnished apartment house, for the proper charges due from such tenants or guests for their accommodation, rent, service, meals and such extras as are furnished at their request. . . ." [1] It becomes unnecessary in this instance to decide whether the charge for cleaning the apartment and blankets at the end of the tenancy was a "proper" charge within the meaning of the statute, for the reason that Tucker himself agreed to what should be proper charges against him in his renting agreement. As before stated, in this agreement, he undertook to leave the apartment "clean" upon vacating it, or to pay for cleaning the same; and he agreed that the owner should have a lien upon his personal property for all unpaid charges under the agreement between them.

Whether or not the apartment was "clean" when it was vacated was a disputed matter, as shown by the testimony. "Clean" is a difficult word to define absolutely; it is a relative term. Its meaning to its users varies with the standards of such users; and it has a different significance in its relation to different objects. Mr. Tucker contends the apartment was left as "clean" as it was when he received it; Mrs. Bayles contends that her apartments have a reputation for being always "absolutely sanitary and immaculate," and that the apartment was not "clean," according to that standard, but that the services of a man were required for three days to clean the kitchen alone. However, this delicate question of fact does not fall to our lot for determination. If Mrs. Bayles was entitled to hold these articles until she was paid the price of cleaning the apartment, provided said apartment was not sufficiently cleaned before being vacated, then a dispute over the condition of the apartment would not so change the petitioner's legal position as to make her guilty of grand larceny in holding possession of the property under a claim of lien which would exist if she proved her contention about the uncleanness of the apartment. For even though the standard of cleanliness exacted by the petitioner should be found by the jury to be an unreasonable standard, and not the standard contemplated by the agreement between the parties, yet, we think petitioner would not be guilty of grand larceny. The record discloses no evil or felonious intent upon the part of the petitioner; she was merely seeking to enforce her civil rights as she believed them to exist. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. (Sec. 484, Pen. Code.) Every taking by one person of the personal property of another, without his consent, is not larceny. Felonious intent is of the essence of the crime of larceny. (*People v. Devine*, 95 Cal. 227, [30 Pac. 378].) If a jury should determine that the apartment was clean, according to the standard contemplated by the parties at the time they made their agreement, at the time petitioner took possession of the goods, and that, therefore, no money was due petitioner for cleaning the same, Mr. Tucker could be amply compensated in damages for the wrongful detention of his property. (Sec. 667, Code Civ. Proc., and sec. 3336, Civ. Code.) But this question must be

tried out in a civil action, and not in a criminal proceeding. (Sec. 3379, Civ. Code; sec. 3380, Civ. Code; secs. 870, 509, 510, 511 and 512, Code Civ. Proc.)

The petitioner is discharged.

Nourse, J., and Brittain, J., concurred.

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[Civ. No. 2162. Third Appellate District.—May 18, 1920.]

DEWEY S. GROVER et al., Appellants, v. JOHN MORRISON, Respondent.

- [1] **NEGLIGENCE—AUTOMOBILE COLLISION—CAUSE OF ACTION—SIMULTANEOUS NEGLIGENCE OF PLAINTIFFS AND DEFENDANTS—EVIDENCE—FINDING—APPEAL.**—In an action for damages for personal injuries received in a collision between plaintiffs' and defendant's automobiles while crossing a bridge, if the evidence is such that the jury cannot determine which of the two was to blame for the collision, in other words, whether it was the defendant's negligence or that of the plaintiffs or the contemporaneous negligence of both that was the proximate cause of the injury, the appellate court cannot hold, as a matter of law, that the finding of the jury that both the plaintiffs and the defendant were equally at fault, and that the accident would not have occurred but for the simultaneous negligence of both, is not supported by the evidence.
- [2] **ID.—POSITION OF MACHINES AFTER COLLISION—PROPRIETY OF QUESTIONS AND STATEMENT BY TRIAL JUDGE.**—In such action, a witness for plaintiffs having testified that he saw evidence of a collision a specified distance from the end of the bridge, the distance stated being at variance with that stated by other witnesses, the court did not commit error in asking him whether he measured the distance or was just guessing at it; neither did the court, in ruling on an objection interposed to a question propounded to such witness as whether he saw any evidence of collision, commit error prejudicial to plaintiffs in suggesting that the machine of plaintiffs had been moved from the position in which it was left as the result of the collision, where, after counsel for plaintiffs stated there was no testimony that the machine had been moved, the court remarked that the question objected to had no application or reference to plaintiffs' machine.
- [3] **ID.—CONDITION OF WITNESSES AS TO SOBRIETY—DENIAL OF CROSS-EXAMINATION—ABSENCE OF PREJUDICE.**—In such action, while the ruling of the court denying plaintiffs the right to cross-examine

one of defendant's witnesses as to whether or not the latter was drunk on the day of the accident and for months previous thereto, such witness having testified that a certain witness of plaintiffs was drunk on the day of the accident, was erroneous, it was not prejudicial to the rights of plaintiffs where the testimony of their witness was merely corroborative of the testimony given by them and a different result would not have followed from the allowance of such cross-examination.

[4] **ID.—RIGHT OF RECOVERY — DAMAGES — INSTRUCTIONS.**—In such action, instructions that if, when the collision occurred, both parties were driving on the center line of the bridge, then both were equally guilty of negligence contemporaneously occurring and that in that case neither was entitled to a verdict for damages as against the other, that if neither party was negligent, or if both parties were equally guilty of negligence, simultaneously committed, neither was entitled to recover against the other, and that the jury were not legally authorized to award damages to either party if the liability of neither was established by the evidence merely because the court explained to them the rule as to the measure of damages in such a case, correctly state the law.

[5] **ID.—FORM OF VERDICT—SUFFICIENCY OF.**—In such action, the jury having found in effect against the plaintiffs on their complaint and against the defendant on his cross-complaint, its verdict "that neither party are entitled to damages," although a little out of shape in its grammatical construction, is in language sufficiently clear and explicit to put beyond doubt the proposition that the result reached by the jury was that neither of the parties to the action was entitled to recover against the other.

**APPEAL** from a judgment of the Superior Court of Yuba County. K. S. Mahon, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. H. Carlin for Appellants.

Ray Manwell for Respondent.

**HART, J.**—Plaintiffs brought the action to recover from defendant damages for injuries received by plaintiff Mae Grover in an automobile collision, alleged to have been caused by the negligence of the defendant, for physicians', nurses', and hospital charges incurred by her and for damage to plaintiffs' automobile. Defendant filed a cross-complaint in which he asked for six hundred dollars, dam-

ages to his automobile, claiming that the collision was due to the negligence of the plaintiffs. Trial was had before a jury, which found "against the plaintiffs and against the defendant and further find that neither party is entitled to damages." Judgment was accordingly entered, from which judgment plaintiffs prosecute this appeal.

It is first contended by appellants that the evidence is insufficient to justify the verdict.

Crossing the Yuba River, at the city of Marysville, is a bridge which, with its approaches, commences at the termination of D Street, in said city, and is approximately two thousand two hundred feet in length to the southerly bank of said river; the roadway on said bridge is twenty-four feet in width, with a raised sidewalk on each side three feet in width and railings on the outside of each sidewalk.

On the eighth day of December, 1917, at about the hour of 4 o'clock in the afternoon, with the sun shining, plaintiffs, husband and wife, drove upon the south end of the bridge in a Ford automobile on their way to Marysville. Plaintiff Dewey S. Grover testified that upon driving upon the bridge he traveled on the east, or right-hand, side at a speed approximately of ten or twelve miles an hour and was traveling carefully. When he was about halfway across the bridge he saw approaching him a small tractor, driven by a man named Davis, coming south from the north end of the bridge on the west side. A little farther on he saw defendant's machine coming around the left-hand side of the tractor to pass it. The witness testified: "It kept coming right toward me. I was running along probably a foot or two from the sidewalk of the bridge. I supposed he would turn off in just a minute, which they do lots of times, people will run close to you and then turn off, but he kept coming, and when I saw he wasn't going to stop I jammed my car into the sidewalk, commenced stopping it, tried to stop it; when he got right up close, about twenty or twenty-five feet away from me, he turned out to the right right quick, to the west, and he didn't turn fast enough to miss me, his car caught on the corner of my car kind of sloping and jammed my car into the bridge and broke one of my wheels down; the hind end of his car flew around kind of catacornered across the bridge, toward the west and southerly. When we stopped, my car was on the sidewalk, the hind wheels, his

car was sitting against my car, sitting across the bridge, we were both kind of across the bridge then. The left-hand corner of defendant's car struck the left-hand corner of mine. When the collision came my car was right up against the east sidewalk of the bridge, probably three inches from it. Before the collision I should judge the defendant was going probably twenty miles an hour, he was going pretty fast."

The plaintiff Mae Grover testified practically to the same facts as did her husband. She was severely injured and people in a passing automobile took her and her husband to Marysville.

William Davis, called as a witness for plaintiffs, testified that he was a tractor driver and on the day of the collision was driving a tractor on the right-hand side of the bridge going south and was about a third of the way or nearly half-way across the bridge when defendant's machine pulled around from behind him and ran into Grover's machine, who was coming north on the east side of the bridge. He said the defendant's automobile "had about 150 feet clearance to get on the other side, but it didn't seem to get there. He turned trying to make it go on the right, on his own side, but he didn't make it fast enough before they collided." The witness described the positions of the two automobiles after the collision, placing them about as plaintiffs did. He said he helped carry defendant's car around so he could pass. On cross-examination the witness was asked if he was drunk or sober at the time of the collision and answered that he "wasn't either one but that I had had a couple of drinks."

J. J. Degire, a stableman residing at Marysville, at the time of the collision was hauling gravel with a two-horse team and wagon. As he drove on to the bridge from the south end he saw the accident and drove to the place. He testified: "I got up and helped get the machines out of the way so I could come on to town." He described the location of the two cars. "I helped Mr. Davis, the tractor driver, move Mr. Morrison's machine out of the way so he could get by." On cross-examination the witness said that Davis was sober so far as he could see.

Two other witnesses, one of them being R. C. De Witt, called on behalf of plaintiffs, testified that they saw the

Ford after the collision and that it was on the east side of the roadway.

The defendant testified that he had noticed Davis in the city of Marysville driving the tractor toward the bridge; that when he (defendant) drove upon the bridge there was no vehicle of any kind ahead of him on the bridge; that when he got fairly on the bridge he was traveling at a rate of about ten or fifteen miles an hour. He testified: "I saw another machine coming toward me close up to the center, until he got so close to me that I had no chance to get away, and he was probably then six inches too close to me, he was over enough on my line so I couldn't turn off and get away fast enough to get away from him, he was coming along pretty fast speed." His description of how the collision occurred, as to the positions of the two cars, was about as already given. He said that he, a man named Strawn, and a colored man moved defendant's car to the sidewalk on the west side.

On cross-examination, the defendant first stated, as he did in his direct examination, that when the collision occurred the plaintiffs' car was "over the center [of the bridge] on my side." On further cross-examination as to this point, his answers were not as positive as they previously were. He, for instance, said: "I don't know that he was over the center—he was at the center—he was at the center; he might have been over. Q. Would you say his left wheel would be at the center? A. I suppose so. . . . Q. How much space, approximately, does it require for your automobile to pass through, taking the full width of the machine at its widest part? A. Seven feet, probably six and one-half or seven, I should judge. I don't know that would cover everything, fenders and all. Q. You came together and your left front wheel struck and locked with the left front wheel of plaintiffs' machine? A. Yes. Q. Both wheels were broken, were they? A. Yes, sir."

David Morrison, a brother of the defendant, testified that he was in a Ford machine and drove behind a tractor on the bridge, passed it and saw there had been a wreck. He stopped and saw his brother and Strawn and another man move his brother's car to the west side of the center of the bridge, plaintiff's car being on the east side of the center, but he said it was not up on the sidewalk on the east side;

the wheels might have been a foot or so from the sidewalk. James Strawn testified to having assisted in moving defendant's car.

[1] It is plainly apparent from the testimony, of which the foregoing statement embraces a correct epitome, that, when the collision occurred, both the plaintiffs and the defendant were driving very close to the center line of the bridge. At any rate, this court must so view the situation. It is likewise also apparent that upon the question whether, when the collision occurred, the two machines were both running on and along the center line of the bridge, there exists a sharp conflict in the evidence. In fact, there is a pronounced conflict in the evidence upon the question whether, at the time of the accident, the machine of the plaintiffs, who were traveling in a northerly direction, was or was not running beyond the west of the center line of the bridge a few inches. It is true that the defendant, after having on direct examination positively testified that the plaintiffs' machine was on the west of the center line of the bridge a few inches when the collision took place, was not so positive on that point on his cross-examination; still, it was for the jury, under such state of the testimony, to determine what was the fact in that regard. But, in any event, the evidence appears to be such as that the jury could well have found, as it did find, that both machines, when they collided, were traveling so close to the center line of the bridge that it would be very difficult to determine, if, indeed, it could justly be determined at all, which of the two, the plaintiff or the defendant, was to blame for the collision, or, in other words, whether it was the defendant's negligence or that of the plaintiff or the contemporaneous negligence of both that was the proximate cause of the injury. It follows, therefore, that this court is in no position to hold, as a matter of law, that the finding of the jury that both the plaintiff and the defendant were equally at fault, and that the accident would not have occurred but for the simultaneous negligence of both, is not supported by the evidence. The verdict, in effect, implies, of course, that, while the defendant was guilty of negligence, the plaintiff was guilty of contributory negligence, in the absence of which the collision and the injuries resulting therefrom to the plaintiff Mae Grover and to plaintiffs' machine would not have happened;



and, in this connection, we notice the contention of the counsel for the appellants that contributory negligence upon the part of the plaintiffs is not set up or pleaded as a defense by the defendant, and, not being so pleaded, the defendant cannot avail himself of the defense of contributory negligence. But the reply to this contention is to be found in the averments of the cross-complaint filed by the defendant. In that pleading, the defendant, asking for affirmative relief against the plaintiffs, alleged and charged in appropriate language that the collision and the consequent damage were due directly and solely to the negligence of the plaintiff, Dewey S. Grover, in that, when the accident occurred, the latter was driving his machine on the west of the center line of the bridge. This is, of course, a straight allegation that the plaintiff himself, by his own negligence, directly contributed to the collision, and thus the issue of contributory negligence upon the part of the plaintiffs was expressly and directly submitted by the pleadings. The cause was not, as is often true where a cross-complaint is filed and the real, vital issues are made up and tendered by an answer thereto, tried alone upon the cross-complaint and the answer of the plaintiff thereto. Each of the parties was seeking affirmative relief, and the case was necessarily tried upon all the pleadings of both parties—that is, upon all the issues involved in all the pleadings filed, and hence, as above suggested, to ascertain what the vital issues of fact to be determined by the jury were, all the pleadings and the issues submitted by them were necessarily to be considered in their entirety. Thus viewing the situation as to the issues of fact involved in the action, as they were made up by the several pleadings of the parties, it is plainly manifest, as above stated, that one of the important questions of fact raised by the pleadings as a whole and which the jury were required to consider and determine, was whether the plaintiff, Dewey S. Grover, himself was guilty of negligence which proximately contributed to the collision and its consequences.

It is to be said, however, that the counsel for the appellants does not appear to be so insistent upon the proposition that there is no substantial support in the evidence for the verdict or upon the point that the issue of contributory negligence upon the part of the plaintiff Dewey S. Grover is not properly raised by the pleadings as he is upon the propo-

sition that, in view of the asserted unsatisfactory character of the evidence as a foundation for the finding of the jury, certain alleged erroneous rulings of the court upon the question of the legal propriety of certain testimony should, with certain alleged erroneous instructions as to the law of the case, be held a sufficient predicate for a judgment of reversal. These assignments will now briefly be considered.

[2] During the direct examination of R. C. De Witt, a witness called for plaintiffs, he was asked where on the bridge he saw any evidence of collision. The question was objected to, counsel for defendant saying: "This collision occurred about ten minutes after four, all these machines had been moved. Mr. Carlin: There is no evidence that the plaintiffs' machine was moved at all. The Court: Two witnesses testified it was moved. Mr. Carlin: Not the plaintiffs' machine, no witness testified at all that plaintiffs' machine was moved at any time. The Court: That is not asking about the plaintiffs' machine. Mr. Carlin: That is only preliminary. The Court: I will hear it; answer the question. A. I should judge 350 feet somewheres from the north end. Mr. Carlin: What did you see there? Counsel for Defendant: Same objection. The Court: It is very evident if that is true there was quite a change in the machines. Mr. Carlin: How many feet? A. About 350 feet. The Court: 427 feet. Mr. Carlin: Would you say 350 feet was exact or might it be 427? Objected to as leading, immaterial, irrelevant and incompetent. The Court: I will let him answer. You didn't measure it? A. No, sir. The Court: Just guessing at it? A. Just guessing at it. Mr. Carlin: What did you see? A. I saw a Ford and another car in front of it."

The point made by counsel as to the foregoing is that the court, in stating that the plaintiffs' machine had been moved from the position in which it was left by the collision, there having been no testimony that it was moved at the time referred to by the witness De Witt, "trenched upon the province of the jury." It is further objected that the court trespassed upon the domain of the jury when it stated that there was evidence of a collision on the bridge about "427 feet" from the north end thereof, the witness having previously estimated that the distance was about 350 feet from the north end of the bridge, and, further, that the court was

without legal right to ask the witness if he was merely making a guess as to the distance.

There is nothing so serious in the action of the court thus referred to and criticised, assuming it to be justly amenable to all that is said against it, as to justify us in declaring that thereby the jury were unduly influenced in their consideration of the case or led to reach the conclusion evidenced by their verdict. The court had the right to ask the witness whether he was giving a mere approximation of the distance, or, what amounts to the same thing, "guessing at the distance," or whether his statement as to the distance was based upon an actual measurement thereof. Counsel would not say or contend that he or the attorney on the other side, according as the exigency of the situation might require it, would not be allowed properly to ask such a question or inquire whether a witness, in stating distances, based his testimony in that respect on actual measurements or a mere guess or approximation, and certainly, if counsel may ask such a question, it cannot be error for the court to ask it, if the question is propounded by the latter in a proper manner or so that the jury may not infer that it is the desire or sole purpose of the court thus to discredit the witness or prejudice his testimony in the minds of the jury. As to the suggestion of the court that the machine of the plaintiffs had, before the witness saw any "evidence of a collision," been moved from the position in which it had been left as a result of the collision, it will be noted that, after counsel for plaintiffs stated that there was no testimony that the machine had been moved, the court remarked that the question objected to had no application or reference to plaintiffs' machine, and this observation by the court in a measure corrected its previous alleged misstatement as to the removal of said machine. Moreover, counsel for the plaintiffs having called attention to the fact that there was no testimony up to that stage of the case showing that plaintiffs' machine had been moved, the jury, we must assume, must also have then recalled that there was then no such testimony before them, and we must further assume that if there was no proof of the plaintiffs' machine having been moved, the jury would not assume that there was on the mere inadvertent intimation by the court that such testi-

mony had been given before them. We cannot perceive any merit in the objection here considered.

[3] The witness Davis, as above shown, testified in behalf of the plaintiffs. On cross-examination he was asked if he was not under the influence of intoxicating liquor at the time the accident, which he claimed to have witnessed, occurred. He denied that he was then intoxicated. The defendant called one L. P. Worden as a witness, who testified that he had seen the witness Davis as the latter was leaving Marysville with his tractor on the day of the collision and that Davis was drunk. Counsel for plaintiffs, on cross-examination, asked the witness whether he was not drunk himself and whether it was a fact that up to that time for months he did not draw a sober breath. Objections to both questions were sustained and, referring to the second one, the court said: "Mr. Carlin, that is not a proper question to ask. I have ruled. The witness is entitled to protection on the stand and I am going to protect him; it isn't right to ask insulting questions of the witness, and don't do it any more."

We are at a loss to understand the theory upon which the court disallowed the cross-examination. The obvious purpose of proving that Davis was intoxicated was to show that his mental condition was such at the time of the collision as that he was not able to form a proper or an accurate conception of the circumstances under which the collision occurred, or, in other words, to show that his testimony was unreliable and could not be depended upon; and the cross-examination of Davis on that line, as well as any testimony offered in impeachment of his denial of having been drunk at the time in question, were proper. Upon identically the same theory, it was proper for the plaintiffs to show, if it could be done, that Worden was himself intoxicated to an extent that he was thus rendered incapable of knowing or determining whether Davis was intoxicated, or whether, being intoxicated himself, and experiencing the usual effects of such a condition, his brain was susceptible to the impression that every person he met or saw, and not he, was in a state of alcoholic intoxication. But, while we doubt not that the ruling excluding the cross-examination was error, we do not feel that we are justified in holding that it was prejudicial to the rights of the plaintiffs. In other words, we

cannot say that the jury's conclusion was affected by the ruling, or that a different result would have followed from the allowance of the cross-examination. Davis denied that he was intoxicated at the time of the accident, and it was for the jury to determine from his testimony, as compared to that of Worden, what his condition as to sobriety was. Furthermore, as above shown, the testimony of Davis was only corroborative of that of the plaintiffs as to the claim of the latter that the defendant, at the time of the collision, was driving on the east of the center line of the bridge, and even with the testimony of Davis given upon the theory that he was in a perfect state of ebriety when the collision happened, the state of the evidence, as before declared, was such as that the jury might still be in serious doubt as to which of the parties was directly responsible for the accident and thus have been brought to the conclusion at which they arrived, to wit, that both were equally at fault.

[4] The several instructions, given by the court at the request of the defendant, and to which objection is here made because, as is the contention, they do not state the law correctly, may be summarized as follows: That the jury are not to understand that they are to give damages simply because instructions involving the statement of the rule as to the measure of damages are addressed to them by the court; that such instructions have no application where the liability of the defendant has not been established, "and should not be understood as conveying any intimation that in the opinion of the court the plaintiff is entitled to damages or not [instruction No. 1]; that if you believe from the evidence that the plaintiffs and defendant approached each other from opposite directions on what is commonly known as the D Street bridge, and that their automobiles collided on the center line of said bridge, and that if ordinary care had been exercised on the part of both plaintiffs and defendant, and there was room for the said parties to have turned further to their right-hand sides of said bridge, respectively, thus avoiding any collision, then I instruct you that it is the law that both parties were negligent and neither party may recover as against the other" (instruction No. 5); that if neither party was negligent neither can recover from the other (instruction 7); that if both parties were equally guilty of negligence, then neither can recover (instruction

8); and the giving by the court to the jury of the form of verdict which they returned into court.

The instructions thus referred to, although in some respects, awkwardly phrased, stated the law correctly to the jury. Obviously, the jury were not legally authorized to award damages to either party if the liability of neither was established by the evidence merely because the court explained to them the rule as to the measure of damages in such a case as this; and a more obvious proposition could not be stated than that if neither party was negligent, or if both parties were equally guilty of negligence, simultaneously committed, neither was entitled to recover against the other. By instruction No. 5, the court clearly meant to say, and undoubtedly the jury so understood the instruction, since it could bear or convey no other meaning, that if, when the collision occurred, both parties were driving on the center line of the bridge, then both were equally guilty of negligence contemporaneously occurring and that in that case neither was entitled to a verdict for damages as against the other. As so understood, the instruction involved a correct enunciation of the rule in such a case. It may be added here that the court, in its charge to the jury, gave a full and fair statement of all the principles of law pertinent to the case as it was made by the evidence.

[5] The complaint against the form of the verdict returned by the jury possesses no merit. Its effect was merely to find against the plaintiffs on their complaint and against the defendant on his cross-complaint, and "that neither party *are* entitled to damages." Although a little out of shape in its grammatical construction, the verdict is in language sufficiently clear and explicit to put beyond doubt the proposition that the result reached by the jury was that neither of the parties to the action was entitled to recover against the other.

The judgment is affirmed.

Nicol, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 3310. Second Appellate District, Division One.—May 18, 1920.]

**TITLE INSURANCE AND TRUST COMPANY** (a Corporation), Special Administrator, etc., Respondent, v.  
**WILL D. GOULD**, as Executor, etc., Appellant.

- [1] **PLEADING—SUPPLEMENTAL COMPLAINT—SERVICE OF SUMMONS.**—Where, in an action upon a promissory note, following the death of the maker, a supplemental complaint is filed, in which the substance of the original complaint is incorporated, together with appropriate allegations showing the death of the maker of the note, the appointment of the executor, and the presentation of a claim, and summons is issued upon such supplemental complaint and served upon the executor, there is no necessity or requirement that such executor should be served with the summons issued on the original complaint.
- [2] **ATTORNEY'S FEES—ACTION ON PROMISSORY NOTE—CHARGE INCURRED—EVIDENCE.**—The plaintiff in an action on a promissory note is not to be denied attorney's fees because of the fact that one of its attorneys is a regularly paid attorney for whose services in the case no additional charge is incurred, where the main counsel in the case is not connected with plaintiff, but is specially employed by plaintiff, and plaintiff is liable to this counsel for such an amount as will compensate him for his services.
- [3] **ID.—VALUE OF SERVICES—DETERMINATION BY COURT—EVIDENCE.**—Where the complaint in such action alleges that a special attorney has been employed, and that attorney takes the stand and testifies to the different acts which he has performed in the conduct of the case from its commencement, the court is authorized to form its own conclusion as to the value of such services; and even though testimony is given by experienced attorneys as to what, in their opinion, would be a reasonable fee, the court, under such circumstances, may disregard such testimony and make an allowance for attorneys' fees in accordance with its own conclusion.
- [4] **ESTATES OF DECEASED PERSONS—ACTION ON CLAIM—PERSONAL LIABILITY OF ADMINISTRATOR FOR COSTS.**—In an action upon a promissory note against the special administrator of the estate of the deceased maker of the note, following the rejection of a claim based on such note, it is within the discretion of the court to assess the additional costs incurred against the administrator personally without any particular finding of mismanagement or bad faith.
- [5] **ID.—PRESENTATION OF CLAIM AS PREREQUISITE TO SUIT.**—The presentation of a claim for damages arising out of an alleged

wrongful attachment, or for attorney's fees for services rendered the estate after the death of the decedent but prior to the appointment of a special administrator, is a necessary prerequisite to the bringing of a suit thereon.

- [6] **ID.—ATTORNEY'S FEES—NATURE OF CHARGE—PROPER EXCLUSION OF EVIDENCE.**—Attorney's fees are not charges directly against the estate of a deceased, but are allowances made to the administrator or executor; therefore, in an action upon a promissory note by the special administrator of the estate of the deceased payee, testimony to sustain an alleged cause of action, by way of cross-complaint, for compensation for services as attorney rendered by the maker of the note to such estate after the death of the payee but prior to the appointment of plaintiff as special administrator, is properly excluded.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Will D. Gould, *in pro. per.*, for Appellant.

Thos. C. Ridgway for Respondent.

**JAMES, J.**—This action was brought in the lifetime of James H. Blanchard to recover upon a promissory note made in favor of Samuel F. Baker, of whose estate plaintiff is the special administrator. The judgment was in favor of plaintiff, and the defendant, in his representative capacity as executor of the estate of Blanchard, appeals.

Summons in the action was not served upon Blanchard, but after his death his executor was substituted as party defendant and a claim for the amounts sued for was regularly presented to such executor. The executor allowed the claim for the principal amount of the note and interest and rejected the same as for any attorney's fees or costs. Supplemental complaint was then filed, in which the substance of the original complaint was incorporated, together with appropriate allegations showing the death of the maker of the note, the appointment of the executor, and presentation of the claim. The summons was issued upon this supplemental complaint and served upon the executor. [1] One of the points made by appellant is that he should have been served with the summons on the original complaint. How-



ever, the plaintiff appears to have proceeded in strict compliance with the law in such a case, and as the supplemental complaint stated a complete cause of action in itself, there was no necessity or requirement that any other summons than that served should have been used. (Sec. 1502, Code Civ. Proc.) In *Falkner v. Hendy*, 107 Cal. 49, at page 52, [40 Pac. 22], the court said: "Section 1502 of the Code of Civil Procedure provides that, if an action is pending against a decedent at the time of his death, it must be presented to the executor or administrator as in other cases; 'and no recovery shall be had in the action unless proof be made of the presentations required.' Regularly, in such cases, a supplemental complaint should be filed, alleging the death and due presentation of the claim." (*Frazier v. Murphy*, 133 Cal. 91, [65 Pac. 326].) In *McMinn v. Whelan*, 27 Cal. 300, at page 313, the court declared: "By filing the supplemental complaint and issuing a summons thereon, the original action became merged in the action as supplemented by the addition of parties and subject matter, and the summons last issued should have been served by publication in order to clothe the court with jurisdiction of the persons of the absent defendants." In the claim as presented to the executor the claimant set forth that "\$300 is a reasonable attorneys' fee therein, and in addition thereto claimant incurred costs of court and sheriff's fees amounting to \$11.75." As before noted, the executor allowed only the principal sum and interest due and rejected the "balance" of the claim. The trial judge made an allowance of \$105 for attorneys' fees and included the \$11.75 costs. The additional costs incurred in this action, which amounted to \$8.35, were assessed against the executor personally. Appellant complains that under the evidence no attorneys' fees should have been allowed; also that the item of costs last mentioned should not have been assessed against the executor personally. [2] The first contention is based upon the fact that it appeared in evidence that one of the attorneys for the plaintiff was a regular paid attorney of plaintiff corporation and that, therefore, it appeared that plaintiff had not incurred by reason of this action any charge which it was not obligated to pay in the course of its own business. This contention, however, is not borne out by the evidence, because it is shown that the main counsel in the case was not connected

with the plaintiff corporation, but was specially employed by plaintiff and that plaintiff was liable to this counsel for such an amount as would compensate him for his services. [3] This evidence was sufficient to sustain the allowance as made. On the last question, *Prescott et al. v. Grady*, 91 Cal. 518, [27 Pac. 755], is not at all decisive in favor of appellant's position. In this case it was particularly alleged in the complaint that a special attorney had been employed, and this attorney testified to different acts which he had performed in the conduct of the case from its commencement. The court, considering the work performed and shown in evidence, was authorized to form its own conclusion as to the value of such services, which were purely legal. (*Conner v. Blodget*, 18 Cal. App. 787, [124 Pac. 733]; *Eastman v. Sunset Park Land Co.*, 35 Cal. App. 628, [170 Pac. 642].) Even though testimony had been given by experienced attorneys as to what, in their opinion, would be a reasonable fee, the court, under the circumstances of this case, might have disregarded such testimony. [4] It is within the discretion of the court to assess these costs against the executor personally without making any particular finding of mismanagement or bad faith. (*Meyer v. O'Rourke*, 150 Cal. 177, [88 Pac. 706].) The decision last cited also holds that where the executor appeals in his representative capacity alone (as is the case here), he is not an aggrieved party in the sense that permits him to contest the allowance of a judge for costs entered against him personally.

[5] By way of counterclaim, defendant charged that an attachment against the property of his testator was levied without cause or sufficient reason, and prayed for damages on that account in the sum of \$1,000. By cross-complaint he asserted a charge against the estate of Baker for attorney's fees rendered by the deceased after the death of Baker and before the appointment of plaintiff as special administrator. The court properly refused to allow testimony to be given to sustain either alleged cause of action. This ruling in the first place was properly made because it was not pretended that any claim had been presented against the estate of Baker covering the matters alleged. The presentation of such a claim was a necessary prerequisite to the bringing of suit. [6] As to the attorney's fees, a further answer is suggested to the alleged cause of action made

by the cross-complaint, to wit: that attorney's fees are not charges directly against an estate, but are allowances made to the administrator or executor. To this point respondent cites *Briggs et al. v. Breen et al.*, 123 Cal. 657, [56 Pac. 633, 886]. The findings made by the trial judge sufficiently disposed of the issues presented.

We find no error in the record sustaining appellant's plea for a reversal.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 16, 1920, and the following opinion then rendered thereon:

ANGELLOTTI, C. J.—The application for a hearing in this court after decision by the district court of appeal of the second appellate district, division one, is denied.

As to the refusal of the trial court to allow testimony to sustain the claim of defendant's testator for attorney's fees for services rendered in the matter of the *Estate of Baker*, if the services were rendered to someone authorized to bind the estate, the action of the trial court is correct, for the reason that the matter was one to be adjudicated in the probate proceedings.

Shaw, J., Lawlor, J., and Sloane, J., concurred.

[Civ. No. 2949. Second Appellate District, Division One.—May 18, 1920.]

**B. A. STRAUS, Respondent, v. J. B. EATON et al.,  
Appellants.**

- [1] **CONTRACTS—LEASE OF NEWSPAPER ROUTE—SIGNATURE BY WIFE OF LESSOR WITHOUT AUTHORITY—LIABILITY OF LESSEE FOR NEWSPAPERS RECEIVED.**—A written agreement leasing a newspaper route, signed by the lessee, the name of the lessor being signed by his wife without written authority from him, is binding upon the lessee where he received from the lessor a large number of the newspapers for which, in such instrument signed by him, he promised to pay.
- [2] **ID.—ORAL ASSIGNMENT—VALIDITY OF.**—The lessor of a newspaper route may make an oral assignment of the amount due thereunder from the lessee to him; and he may orally authorize another to make such an assignment.
- [3] **ID.—ACTION TO RECOVER BALANCE DUE—NUMBER OF PAPERS DELIVERED—DEMURRER FOR UNCERTAINTY.**—In an action against the lessee of a newspaper route to recover a balance alleged to be due for newspapers delivered under a written lease wherein it is provided that the lessee shall pay a given price per hundred copies, if the complaint fails to state the number of copies delivered, a demurrer on the ground of uncertainty should be sustained.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Reversed.

The facts are stated in the opinion of the court.

Wm. T. Kendrick for Appellants.

B. F. Woodard and A. W. Hare for Respondent.

**CONREY, P. J.**—On the first day of August, 1914, one A. V. Dunsmoor was the owner of a newspaper route of the

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1. Who must sign note or memorandum for the sale of real property or chattels within the statute of frauds, notes, 47 *Am. Rep.* 532; 4 *Ann. Cas.* 893; 6 *Ann. Cas.* 298; 28 *L. B. A. (N. S.)* 680.

Necessity that agent have written authority to make memorandum required by statute of frauds, notes, 7 *Ann. Cas.* 1101; 8 *Ann. Cas.* 852; *Ann. Cas.* 1912B, 1295; *Ann. Cas.* 1917A, 524.

"Los Angeles Daily Times" covering certain territory in Glendale, California. The complaint alleges that on that day Dunsmoor entered into an agreement with defendant Eaton. By the terms of that agreement, as shown in the complaint, Dunsmoor leased to Eaton the described territory of the city carrier service of the "Los Angeles Times," for a period of two years from the date of the writing, August 1, 1914. This writing was signed by the defendant J. B. Eaton, and also was signed, "A. V. Dunsmoor, By Anna A. Dunsmoor," but was not signed by A. V. Dunsmoor. On the same day, defendant Eaton as principal and the other two defendants as sureties executed to A. V. Dunsmoor a bond in the sum of \$1,000, conditioned for the performance by Eaton of the terms of said contract. In the alleged contract it was provided that Dunsmoor would furnish papers to Eaton and that Eaton would pay Dunsmoor therefor at the rate of \$1.40 per hundred copies. This action was brought to recover an unpaid balance alleged to be due for papers delivered to Eaton under that contract. Judgment was entered against the defendants in the sum of \$924.35. On motion for new trial, the court ordered that the motion be granted, unless the plaintiff consented to a reduction of the amount of the judgment to the sum of \$716.89. The plaintiff filed written consent to such reduction. The defendants appeal from the judgment.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on account of sundry uncertainties in the complaint, including the point that the complaint did not show the number of copies of the newspaper that were received by Eaton from Dunsmoor for service on the route mentioned in the complaint. These demurrers were overruled. [1] Appellants claim that the purported contract was invalid, because it was not signed by A. V. Dunsmoor, nor by any person having written authorization from him. (Civ. Code, sec. 1624, subd. 1, and sec. 2309.) It is true that in the complaint it was not alleged that Anna A. Dunsmoor had received any authority in writing from A. V. Dunsmoor to enter into a contract for him or in his name. And at the trial of the action the only attempt on the part of the plaintiff to establish such agency is found in the testimony of Mrs. Dunsmoor that she is the wife of A. V. Duns-

moor, and that prior to August 1, 1914, he told her that he could not attend to the business with Eaton and that she would have to look after the lease matter and attend to the business. But it is likewise a fact that the defendant Eaton received from A. V. Dunsmoor a large number of the newspapers for which, in the written instrument signed by him, he had promised to pay, and that in this action Eaton is, as to the contract, "the party to be charged" thereon. (*Harper v. Goldschmidt*, 156 Cal. 245, [134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689, 104 Pac. 451].) In that decision the court quoted Chitty on Contracts, where it was said that the reason why a party may sue on a contract although it may be void against him for want of his signature under the statute of frauds is that the signature is prescribed as "necessary evidence of a contract," and not as an essential or constituent part of the engagement itself. Under the law as thus defined, we think that the contract, as signed by Eaton, was binding upon him. This being so, it furnished a sufficient consideration for the bond, and thus establishes the liability of the sureties on the bond, as well as that of their principal.

[2] Appellant contends also that the evidence is insufficient to support the finding that the claim was assigned by A. V. Dunsmoor to the plaintiff. Section 954 of the Civil Code provides generally that a thing in action arising out of an obligation may be transferred by the owner. It is only in particular instances, as in claims for wages or salary, that the assignment must be in writing. (Civ. Code, sec. 955.) So, A. V. Dunsmoor could have made an oral assignment of the indebtedness sued on herein. Therefore he could orally authorize an agent to make the assignment in his behalf. We think that the authorization of Mrs. Dunsmoor, as shown by her testimony, was broad enough to give her power to collect the amount due, and incidentally to assign the claim if in the exercise of her discretion as agent she found such assignment to be necessary or convenient.

[3] The complaint did not show the number of copies delivered. It was only alleged that Dunsmoor furnished papers to Eaton "under the terms of said agreement and during the continuance of said agreement, and upon the price therein stated, in the sum of \$1,249.45"; that no part of said sum has been paid, except, etc. When the defend-

ants demurred on the ground of uncertainty directed to this point, plaintiff should have been required to state the number of papers delivered. While this might be regarded as an unimportant error if there were no other objections to the judgment, we rule upon this point so that the error may be corrected if the matter shall be again presented in the court below.

On the evidence introduced, and about which there is no dispute, the amount of the judgment is in excess of the amount due. It was stipulated that the items set out in the bill of particulars correctly show the number and character of the papers furnished. The total number shown, including 4,119 Sunday papers, is 55,326, which at the rate specified in the agreement would amount to \$774.56. The complaint admits that \$325.10 of the amount due for the papers furnished has been paid. It follows that the findings, with respect to the amount due and unpaid, are not sustained by the evidence. For that reason the judgment is reversed.

Shaw, J., and James, J., concurred.

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[Civ. No. 3099. Second Appellate District, Division One.—May 18, 1920.]

**IMPERIAL VALLEY AUTO COMPANY (a Copartnership), Appellant, v. MINNIE MAY TONEY, Administratrix, etc., Respondent.**

[1] **CLAIM AND DELIVERY—PLEADINGS—FINDINGS—UNWARRANTED AFFIRMATIVE RELIEF TO DEFENDANT.**—Where the answer filed by the defendant in an action to recover possession of certain personal property does not claim a return of the property, and there is nothing in the pleadings or findings to indicate that the property was delivered to the plaintiff, or was not all the time held in possession of the defendant, a judgment that defendant recover from plaintiff the said personal property, or, if delivery thereof cannot be had, then the defendant have judgment in a stated sum (found to be the value of the property, less a certain allowed credit), and for costs, cannot be sustained, in so far as it grants to the defendant affirmative relief, except as a judgment for costs.

APPEAL from a judgment of the Superior Court of Imperial County. R. Y. Williams, Judge presiding. Modified and affirmed.

Chas. L. Childers for Appellant.

James W. Glassford for Respondent.

CONREY, P. J.—Action brought by plaintiff to recover possession of personal property. Judgment for defendant, and the plaintiff appeals therefrom. The judgment-roll is the only record before us.

[1] The judgment, in terms, is that the defendant recover from plaintiff the said personal property, or, if delivery thereof cannot be had, then the defendant have judgment in a stated sum (found to be the value of the property, less a certain allowed credit), and for costs.

The answer filed by defendant did not claim a return of the property. Indeed, there is nothing in the pleadings or findings to indicate that the property was delivered to the plaintiff, or was not all the time held in possession of the defendant. Under such circumstances, that part of the judgment which grants to the defendant affirmative relief cannot be sustained, except as a judgment for costs. (Code Civ. Proc., secs. 627, 667; *Banning v. Marleau*, 101 Cal. 238, [35 Pac. 772].)

It is ordered that the judgment be modified by striking therefrom that part thereof which provides that defendant recover the described automobile, or, in case delivery thereof cannot be had, that defendant have and recover the sum of \$405.90. As so modified the judgment is affirmed.

Shaw, J., and James, J., concurred.



[Civ. No. 3329. First Appellate District, Division One.—May 18, 1920.]

**A. L. HUBBARD et al., Appellants, v. A. JURIAN et al., Respondents.**

- [1] **APPEAL—FORMER JUDGMENT—SUBSEQUENT DEPARTURE FROM DOCTRINE ANNOUNCED—LAW OF CASE.**—A final judgment of the district court of appeal in a given case (a hearing in the supreme court being denied) constitutes the law of the case on a second appeal, notwithstanding that subsequent to the time such judgment became final, but prior to the second appeal, the doctrine of the decision of the district court of appeal on the first appeal is departed from by the supreme court in a different case.
- [2] **MECHANICS' LIENS—WORK ON BUILDING—TIME OF CESSATION—PAINTING OF WINDOW-SILLS PROPERLY OVERLOOKED.**—The painting of window-sills under the direction of the architect to protect them from cracking in the sun, if trivial in amount and not done on the contract, nor by the contractor, is properly overlooked by the court in determining when work on the building ceased.
- [3] **ID.—EQUITABLE GARNISHMENT BY GIVING OF STOP NOTICE—MONEY AFFECTED.**—The equitable garnishment which is occasioned by the giving of a stop notice under section 1184 of the Code of Civil Procedure attaches only to such sum as might be payable to the contractor after the extinguishment of liens.
- [4] **APPEAL—REVERSAL—RECOVERY COSTS—SERVICE OF COST BILL ON COAPPELLANT UNNECESSARY.**—Where the *remittitur* provides "the appellants to recover costs on this appeal," it does not allow one appellant to recover costs from another appellant, but only from the respondent, such coappellants not being adverse parties, notwithstanding they took separate appeals and the judgment of the appellate court results in the reduction of judgment as to one and an increased judgment against the other; and in such case it is not necessary for the former to serve a copy of its cost bill on appeal on the latter.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing to strike out a cost bill for costs on a former appeal. W. A. Beasley, Judge. Affirmed.

The facts are stated in the opinion of the court.

Ralph C. McComish for Appellants.

F. H. Bloomingdale, James Walter Scott and James J. Harrington for Respondents.

KOFORD, J., *pro tem.*—Two appeals are involved here. Plaintiffs appeal from the portion of the judgment foreclosing the mechanics' liens of some of their assignors and denying relief for the claim of Hubbard & Carmichael, one of plaintiffs' assignors. Plaintiffs also appeal from the order of the trial court refusing to strike out the cost bill for costs on a former appeal.

The present plaintiffs are the executors of the original plaintiff, now deceased.

When this case was originally tried the judgment in favor of the then plaintiff included the Hubbard & Carmichael lien filed July 2, 1913. The defendants each appealed from the judgment and order denying a new trial. On this appeal the judgment was modified in certain respects, including the disallowance of this particular lien on account of the claim of lien having been filed too late. (*Hubbard v. Jurian*, 35 Cal. App. 757, [170 Pac. 1093].) Upon the going down of the *remittitur* the trial court entered judgment in accordance with its directions upon the same findings of fact, but containing recitals of the appeal and decision on appeal. Thereupon plaintiffs moved for a new trial, which was denied, and then took this appeal from a portion of the judgment.

Appellants, in seeking a reversal of the judgment, contend (1) that the finding that Odell and Jurian were estopped from claiming that the work had been abandoned prior to March 10, 1913, by reason of having alleged in their answer that the abandonment occurred on or about that date, should prevail over the finding that the contractor ceased from all labor on the building on March 1, 1913, which it is argued (2) is not supported by the evidence.

Appellant also urges (3) that Hubbard & Carmichael Bros., having filed a stop notice under section 1184 of the Code of Civil Procedure, were entitled to be paid out of the money in the hands of the owners belonging to the contractor, which was found to be \$948; and (4) that a laborer or materialman may recover from the surety of the contractor without having perfected a lien.

The decision on the former appeal of this case disposes of most, if not all, of the points, and, therefore, is the law of the case with respect to the question decided on that appeal. The doctrine of the decision on the former appeal in this

case on the fourth point above urged by appellants has been departed from by the supreme court, since the judgment herein was entered on the *remittitur*, in the later case of *General Electric Co. v. American Bonding Co.*, 180 Cal. 765, [182 Pac. 444], notwithstanding that a petition for hearing in the supreme court of the former appeal of *Hubbard v. Jurian*, *supra*, was denied by that court. [1] But our decision on the former appeal must still be considered to be the law as far as this case is concerned. It is a final judgment as to that point, and for all purposes of this particular case it remains established, whether it may be afterward thought to be right or wrong. With respect to this point on appeal appellants recognize that this court is bound by its former decision.

But with respect to the other three points on appeal appellants assert that there is no law of the case. First, they point out that in the first decision the word "estoppel" is not used, and that therefore their first point is still open for decision. We do not agree with this. Although the word "estoppel" is not used as is claimed, yet the decision fully discusses this point, and decides that the defendants' pleading as a whole is of such a nature that it does not estop them, and that the finding as to the date of abandonment stands. We quote from the decision as follows:

"It is contended upon behalf of the respondent Hubbard that the claim of lien of Hubbard & Carmichael which was filed on July 2, 1913, was within time because it was filed within 120 days from March 10, 1913, 'on or about' which date the answer alleged work on the building was abandoned. In this behalf it is urged that this date, by reason of the averments of the answer, was admitted by the defendants to be the date when work ceased upon the building, and that as a consequence the trial court should have accepted that date as the time of cessation of labor despite evidence to the contrary, and that the finding of the trial court that work ceased upon the building on March 1, 1913, was, in so far as the Hubbard & Carmichael claim was concerned, unauthorized, and cannot, therefore, be permitted to prevail over the admitted fact.

"In support of this contention we are cited to the familiar rule that an admission made in the pleading is binding on the party making it; that a fact admitted by the pleadings

of an opponent need not be proved; and that any evidence introduced contrary to such admission must be disregarded by the trial court when making its finding. In our opinion this rule has no application to the situation presented by the pleadings in the present case. The burden of proof was upon the plaintiff to show that his assignor, Hubbard & Carmichael, had filed their claim of lien within the statutory time after constructive completion of the building. (Bloom's Law of Mechanics, Supp., p. 258.) The answer of the defendants squarely and sufficiently denied the allegation of the complaint that the building was completed on June 20, 1913. This denial made it incumbent upon the plaintiff to proffer proof showing that the claim of lien had been filed within time. Moreover the phrase 'on or about March 10th,' as used in the answer, is indefinite and uncertain, and might, therefore, consistently mean several days before or after that date, and, inasmuch as the exact date of the completion of the building or the cessation of work thereon was a material fact to be determined by the court below as a foundation for the allowance or rejection of the claims of lien, it cannot be said that the allegation in question was such a definite admission of fact as would preclude the necessity for the taking of evidence or the making a finding thereon.

"The finding of the trial court that work on the building ceased on March 1, 1913, and that such cessation continued for more than a period of thirty days, being sufficiently supported by evidence, it follows that the Hubbard & Carmichael lien, which was filed July 2, 1913 (123 days after March 1, 1913), was just three days too late, and therefore should not have been allowed."

It is thus stated in the decision that the finding of the date of cessation of labor is sufficiently supported by the evidence. [2] Appellants contend that as they were respondents on that appeal they could not attack that finding at that time; but that being appellants now, they may do so. However this may be, we are still of the opinion that the evidence is sufficient to support the finding that the contractor ceased from all labor upon the contracts on March 1, 1913. The work done on March 4, 1913, was painting window panels under direction of the architect to protect them from cracking in the sun, and was trivial in amount. It

was properly overlooked by the trial court, not so much because it was trivial, but because it was not done on the contract, nor by the contractor. This amount of painting should be compared with any steps taken by the owner looking to the protection of his property from deterioration, as distinguished from improving it constructively by either the contractor, or owner, or going ahead in any manner with the contemplated work.

[3] Appellants contend that the third point, touching the stop notice, was discussed in the former decision only with respect to the premature payment made to the contractor; that this court can now decide that this stop notice should be given effect, operating not upon the premature payment of \$1,315, but on the money remaining in the hands of the owners and due the contractor at the time of the service of the withhold notice. Appellants state that the trial court found this amount to be \$948. There is no finding to this effect directly, but it is arrived at by computation. The contract prices were \$5,260 and \$3,600, which, together with extras, make a total of \$9,222. The owners paid installments of \$900, \$1,315, and a further sum of \$1,315, together with the sum of \$4,744.59, to complete the work after abandonment, making a total of \$8,274.59 cost to the owner without paying liens. The difference between this cost and the contract price, with extras, is \$948, ignoring cents.

Is this amount available to plaintiffs under the stop notice, in face of the fact that there are valid liens greatly in excess of this sum? The judgment distributes this sum proportionately among the several valid lien claimants, and also gives them judgment against the sureties on the statutory bond filed by defendant Maryland Casualty Company. Therefore, while the amount of \$948 was due the contractor under the terms of his contract, in one sense, it is not in another. He will never receive it and is not entitled to it. (Code Civ. Proc., sec. 1193.)

It was said in *Hughes Bros. v. Hoover*, 3 Cal. App. 145, [84 Pac. 681]: "The contention of appellant that it was entitled to a personal judgment against the owner growing out of the notice to withhold money is not tenable. The equitable garnishment which is said to be occasioned by such notice, attaches only to such sums as might be payable to the contractor after the extinguishment of liens, for until

such liens are extinguished no sum is payable from the owner to the contractor."

Plaintiffs by reason of the stop notice, therefore, were not entitled to judgment against the owner, nor to be paid out of this fund to the exclusion in whole or in part of the valid lien claimants. This disposes of all the points of the appellants on the appeal from the judgment.

[4] The appeal from the order of the trial court refusing to strike out the cost bill on appeal is based on the fact that the defendants Jurian and Odell did not serve the cost bill on the defendant Maryland Casualty Company as well as upon plaintiffs. The two defendants were appellants there, having taken separate appeals, and plaintiffs' predecessor was the respondent. The *remittitur* provided "the appellants to recover costs on this appeal." It is claimed that inasmuch as the modification of the judgment resulted in a reduction of the judgment against appellants Odell and Jurian, and an increased judgment against appellant Maryland Casualty Company, that said last-named appellant was in fact an "adverse party" to its coappellants, Odell and Jurian, as that term is used in Code of Civil Procedure, section 1033. The *remittitur* did not allow one appellant to recover costs from the other, but only from the respondent (appellants here). The appellants filing the cost bill did not ask for judgment for costs against their coappellant. We must hold, therefore, that those appellants were not adverse parties to each other; that it was not necessary that the cost bill be served on the Maryland Casualty Company; and that the trial court properly refused to strike it out on that ground.

The judgment and order appealed from are affirmed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Civ. No. 3355. First Appellate District, Division Two.—May 19, 1920.]

W. J. HYNES, as Administrator, etc., Respondent, v.  
PEGGY WHITE, Appellant.

- [1] **TRIALS—UNIMPEACHED EVIDENCE—DISREGARD BY COURT.**—A court may not arbitrarily disregard the unimpeached evidence of a single witness.
- [2] **GIFTS—REDELIVERY OF PROPERTY TO DONOR—EFFECT OF.**—Where, in the delivery of property from one person to another, all the elements of a gift *inter vivos* are present, the act of the donee in immediately giving absolute possession of the property to the donor does not militate against the gift.
- [3] **ID.—ESSENTIALS OF VALID GIFT.**—The three requisites of a valid gift are, first, an intention on the part of the donor to make it; second, a delivery to the donee of the thing given; and, third, acceptance by the donee of the thing given.
- [4] **ID.—REVERSION TO DONOR UPON DEATH OF DONEE—VALID CONDITION.**—A gift, coupled with the condition that upon the death of the donee the property shall revert to the donor, is valid.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Reversed.

The facts are stated in the opinion of the court.

David E. Bergman for Appellant.

Cullinan & Hickey for Respondent.

BRITAIN, J.—The respondent, as the administrator of the estate of Alexander Hay, deceased, sued the appellant to recover certain bonds, or their value. In a second count the plaintiff sought to recover \$500 with interest claimed to have been loaned by Hay to the defendant. The defendant denied the allegations of ownership of the bonds by the estate, and alleged affirmatively that Hay had canceled the

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2. Retention or resumption of possession by donor as affecting gift, note, 32 L. R. A. (N. S.) 219.

Transfer of key to receptacle as delivery of possession sustaining gift of contents, note, 40 L. R. A. (N. S.) 901.

note given by her to evidence the five hundred dollar loan. The case was tried without a jury. The trial court found that the defendant was not entitled to certain of the bonds claimed to have been given her May 31, 1913, because it was further found that they were intrusted to her without the intent on the part of Hay to make a gift. It was found that other securities claimed to have been given to the defendant in January, 1914, were given her, and also that Hay forgave her the five hundred dollar debt. It further found that the bonds found to belong to the estate had been sold by the defendant and that their value was \$5,874.50, for which amount judgment was rendered against her. A motion for new trial was denied, and it is claimed that the court erred therein as also in certain proceedings during the trial concerning the tender of the oral evidence of the defendant to explain her evidence given on her deposition on which alone the plaintiff rested his case. It is claimed the evidence does not support the findings, and because this court has reached that conclusion, it is unnecessary to consider the new trial ruling or the tender of the defendant's oral testimony.

The only evidence introduced on behalf of the plaintiff was the deposition of the defendant taken at the instance of the plaintiff. On the part of the defendant there was evidence introduced strongly tending to support the evidence given by her at the taking of the deposition. Reduced to narrative form, the evidence concerning the claimed gift was that Alexander Hay at the time of the gift was about seventy years old. He was divorced many years before. His former wife had remarried twice, and at the time of the gift was living with her sister. After the divorce Hay took up his home with another sister, who was not living at the time of the gift, and the defendant and her brother were the children of that sister of the divorced wife. Hay was fond of the children, particularly of the defendant, and frequently assured her mother that in the event of her death, he would take care of his niece. She grew to young womanhood and married Douglas White, who at the time of the trial was general industrial agent of the Salt Lake Railroad. His business required him to travel a great deal, and apparently his wife at times traveled with him. There was no intimacy between the defendant and her two aunts. After the marriage of



the defendant, who lived in Southern California with her husband, Hay visited their home on one or two occasions, and when they were in San Francisco, they visited him. He was an employee of the custom service in San Francisco, earning from \$125 to \$150 a month. He had no one dependent upon him and no near relatives. In 1913 Douglas White, who was in San Francisco, met Hay, who requested him to telegraph for his wife to come to San Francisco. On White telling him he was returning to Los Angeles that evening, and would send her up, Hay said, "Well, send her up just as quick as you can, because I wish to make arrangement regarding what little property I have."

In response to this request of Hay, Mrs. White came to San Francisco, where she met Hay, and according to her evidence he asked her to go with him to the safe deposit vaults of the Union Trust Company, saying he had something to give her. Prior to that time he had kept a box in these vaults for his own use. Before the visit of Mrs. White he had rented a second box, which he took in her name, but for which she paid the rental. On receiving the box, he directed her to take it into one of the customer's rooms to which he also took his own deposit box. Taking from it the bonds found by the court not to have been given her, he said, "I want you to have these." She was asked if he did not say, "You are to have these bonds after my death, or something like that." To this she responded, "He said, 'I give them to you now—they are yours. They belong to you.'"

She was asked if he did not say, "I will use the income of these bonds and stocks during my lifetime and you can have them after my death," to which she responded, "No, but in the conversation he said, 'I am going to take you over to-morrow to see Mr. — of Sutro's, a brokerage firm, and introduce you, so he will know you and you will know him, and you can collect the money on the coupons.'"

She put the securities in her box and they went to the desk where she signed an order making Hay her deputy to visit her box and gave to him one of the two keys delivered to her. This arrangement was made pursuant to a conversation which she stated was after the gift of the securities and manual delivery of them. She testified that he remarked, "You and Douglas are traveling around so much—suppose you get in a wreck or something—then this box would be

closed to me, and, of course, I don't intend to give this to your heirs. I am giving it to you." The understanding of both parties at the time was that the reference to her heirs was to her two aunts, one of whom was Hay's former wife. The evidence introduced on behalf of the defendant was that of a number of people who knew Hay and to whom he had stated after this transaction that he had given his property to Mrs. White. Mrs. White also testified that she had borrowed \$500 from Hay and had given her note for it; also that he had redelivered the note to her and told her she need not repay that \$500, and directed her to cancel the note. Some time in 1914, she testified, she met Hay and they again went to the safe deposit vaults, when he gave her another bond which she placed with those given her first. The day following the first transaction at the safe deposit vaults, Hay did introduce her to a young man in the banking house of Sutro & Co., and a day or two later he took her back to the safe deposit vaults to assure himself that she knew how to open the box. Prior to his death she cut the coupons from the bonds, giving them to Hay to collect, and, she testified, he paid her the interest collected.

From this evidence the trial court made the finding that Hay had no intention of giving the first bonds to the defendant because of the arrangement by which he was appointed her deputy to go into the box for the avowed purpose of preventing the bonds being taken by her two aunts in the event her death should occur before his own. The same conditions surrounded the gift of the bond in 1914, and he had the same right of access to it as he had to the first bonds, yet the trial court believed the evidence of Mrs. White in regard to that gift as he believed her evidence in regard to the gift of the five hundred dollar note. To reach this conclusion, he must have rejected her positive statement that the conversation which led to her appointing Hay her deputy took place after the gift, although in close connection with it. The only evidence bearing on the intention of Hay to make the first gift was that of Mrs. White. [1] A court may not arbitrarily disregard the unimpeached evidence of a single witness. [2] If her statement was true, all the elements of a gift *inter vivos* were present, and if the gift was made, even though the donor was immediately given

absolute possession of the property, it did not militate against the gift.

[3] The cases are uniform regarding the three requisites of a valid gift: First, an intention on the part of the donor to make it. (*Knight v. Tripp*, 121 Cal. 674, [54 Pac. 267]; *Fanning v. Green*, 156 Cal. 279, [104 Pac. 308]; *Beaumont v. Beaumont*, 152 Fed. 55, [81 C. C. A. 251]; *Ruiz v. Dow*, 113 Cal. 490, [45 Pac. 867]; *Stewart v. Whittemore*, 3 Cal. App. 213, [84 Pac. 841].) Second, a delivery to the donee of the thing given. (Civ. Code, sec. 1147; *Beaumont v. Beaumont*, *supra*; *Beebe v. Coffin*, 153 Cal. 174, [94 Pac. 766]; *Knight v. Tripp*, *supra*; *Hart v. Ketchum*, 121 Cal. 426, [53 Pac. 931]; *Beaver v. Beaver*, 117 N. Y. 421, [15 Am. St. Rep. 521, 6 L. R. A. 403, 22 N. E. 940].) Third, acceptance by the donee of the thing given. (*Beaumont v. Beaumont*, *supra*; *Holmes v. McDonald*, 119 Mich. 563, [75 Am. St. Rep. 430, 78 N. W. 647]; *Beaver v. Beaver*, *supra*; *Frazier v. Perkins*, 62 N. H. 69.) The declarations of the donor both before and after the gift tended to show an intention on his part to make an absolute and unconditional gift. (*Estate of Hall*, 154 Cal. 527, [98 Pac. 269]; *Ruiz v. Dow*, *supra*; *Stewart v. Whittemore*, *supra*; Thornton on Gifts and Advancements, sec. 222 et seq.; *Garrison v. Union Trust Co.*, 164 Mich. 345, [32 L. R. A. (N. S.) 219, 129 N. W. 691]; *Waite v. Grubbe*, 43 Or. 406, [99 Am. St. Rep. 764, 73 Pac. 206]; *Reese v. Philadelphia Trust etc. Co.*, 218 Pa. St. 150, [120 Am. St. Rep. 880, 67 Atl. 124].) Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes in physical possession and control of the property without any retransfer of the ownership by the donee. (*Beaumont v. Beaumont*, 152 Fed. 55, [81 C. C. A. 251].) In this case, as in that, it is contended that the retention of the key of the safe deposit box by the donor with the right to resort to it, in that case for the purpose of getting the coupons, was such a retention of control and possession as would enable him to carry the bonds away and was, therefore, inconsistent with the idea of a gift of the same. But the donee had the same possession and the same power of taking away the subject matter of the gift, and not only so, but she had the rightful power to do so as well as the physical

opportunity. The cases are practically uniform in support of this rule of law. (*Reese v. Philadelphia Trust etc., supra*; *Calkins v. Equitable etc. Co.*, 126 Cal. 531, [59 Pac. 30]; *Stewart v. Whittemore, supra*; *Pink v. Church*, 60 Hun, 580, 14 N. Y. Supp. 337; *Martin v. Martin*, 170 Ill. 18, [48 N. E. 694]; *Garrison v. Union Trust, supra*; *Gilkinson v. Third Ave. R. Co.*, 44 App. Div. 472, [63 N. Y. Supp. 792]; *Waite v. Grubbe, supra*; *Marston v. Marston*, 64 N. H. 146, [5 Atl. 713]; *Blanchard v. Sheldon*, 43 Vt. 512; *Riegel v. Woolcy*, 81 Pa. St. 227.)

On the part of the respondent it is argued that the intention to enable the donor to repossess himself of the bonds upon the death of the donee was inconsistent with a gift to her. The court cannot accept this view of the case for two reasons. [4] In the first place, the gift would have been a valid one if coupled with a condition that upon the death of the donee, the property should revert to him; and, secondly, in this case the trial court was bound, as is this court, by the positive and uncontradicted evidence of the only witness to the matter that the arrangements for the donor to repossess himself of the property in the event of the death of the donee before his own was made after the gift had been completed. Neither this court nor the trial court could reach a determination that the first gift was invalid because, if the donee had died first, the donor might not have been able to establish his right to the bonds. The only evidence in the case fails to support the finding of the trial court against the existence of an intent on the part of the donor to make the gift.

The judgment is reversed.

Langdon, P. J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 17, 1920, a majority of the Justices not having assented to the granting thereof.

[Civ. No. 2684. Second Appellate District, Division Two.—May 19, 1920.]

EDWARD FRANK BOWDEN, a Minor, etc., Respondent,  
v. L. J. HERBERGER et al., Appellants.

- [1] **ANIMALS—ATTACK BY DOG—ACTION FOR DAMAGES—CONFLICTING EVIDENCE—FINDING—APPEAL.**—Where, as in this action to recover for injuries caused by the attack of a dog belonging to the defendants, in which there was sufficient evidence to warrant the jury in finding that the dog was vicious and that the defendants were aware of its viciousness, the appellate court will not disturb the verdict, notwithstanding there was a conflict in the testimony on the question.
- [2] **ID.—PROOF REQUIRED—IGNORANCE BY PLAINTIFF OF CHARACTER OF DOG—INSTRUCTIONS.**—In such an action, a requested instruction “that the plaintiff’s evidence must be sufficient to sustain the allegations of the complaint as to the vicious character of the dog and the defendants’ knowledge thereof, and the plaintiff’s ignorance thereof,” is properly modified by striking therefrom the words “and the plaintiff’s ignorance thereof.” The owner of an animal, not naturally vicious, is liable for injury done by the animal if it was in fact vicious and the owner had knowledge of that fact.
- [3] **ID.—MISCHIEVOUS PROPENSITY OF DOG—INSTRUCTIONS.**—In such an action, the use of the word “mischievous” in an instruction, given at the request of the plaintiff, that “before the plaintiff can recover you must find from the evidence, first, that the dogs before the biting, or alleged biting of the plaintiff complained of, were of a vicious, *mischievous* propensity, and accustomed to biting mankind. Second, that the defendants had knowledge or notice of these characteristics,” do not add to or detract from the efficacy of the instruction.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Griffith Jones, Warren L. Williams and Leland S. Bower for Appellants.

Riddle & Cheroske for Respondent.

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2. Necessity for knowledge by owner of viciousness of domestic animal, note, 1 Ann. Cas. 205.

WELLER, J.—This is an action to recover for injuries to plaintiff, caused by the attack of a dog belonging to the defendants. A jury fixed the damages at one thousand dollars, and from the judgment entered on the verdict defendants appeal.

Defendants were the owners of two bulldogs, and kept them in defendants' back yard, which was inclosed with a high board fence, and from which a gate opened into the alley in the rear of the premises. Plaintiff, a minor six years of age, lived with his mother in the same block, and was accustomed to play in the alley. On the occasion of the injury, he was in the alley spinning a top. One of the dogs had escaped from defendants' premises into the alley, and Mrs. Herberger stood at the open gate calling him. From this point confusion reigned. No witness gives a clear statement of what occurred. Mrs. Herberger testified that as the dog approached her the boy threw the top at him, provoking the assault. Plaintiff denied being the aggressor, and stated that he struck the dog with the top after the animal bit him. But the result was that the dog attacked the boy, and inflicted the injuries upon which this action is based.

[1] Appellants challenge the sufficiency of the evidence to sustain the verdict, claiming a lack of proof that the dog was vicious and that the defendants were aware of its viciousness. Witnesses testified to previous attacks by the dogs on other persons, and that knowledge thereof had been communicated to defendants. While there is a conflict in the testimony on this point, there is sufficient evidence to warrant the jury in finding as it did; and under the well-established rule, this court will not disturb the verdict.

[2] The second point urged by appellants is that the court erred in instructing the jury. Defendants requested the following instruction: "You are further instructed that the plaintiff's evidence must be sufficient to sustain the allegations of the complaint as to the vicious character of the dog and the defendants' knowledge thereof, and the plaintiff's ignorance thereof." The court modified the instruction by striking out the words "and the plaintiff's ignorance thereof." Counsel cites the case of *Haneman v. Western Meat Co.*, 8 Cal. App. 698, [97 Pac. 695], as authority for his assignment of such action by the court as error. The

court in that case did hold that the plaintiff was required to prove the allegations of his complaint that the horse was vicious, that the defendant knew of that fact, and that plaintiff was ignorant thereof. But that was an action by a servant against his master; and, as stated in the opinion, the employee assumes the risks that are ordinarily incident to the business in which he is employed.

The general rule is that the owner of an animal, not naturally vicious, is liable for injury done by the animal if it was in fact vicious, and the owner had knowledge of that fact. (*Finney v. Curtis*, 78 Cal. 498, [21 Pac. 120].) The instruction as given was in accord with that rule, and the court properly applied it.

The jury was fully instructed on the question of contributory negligence, and it was not limited in its scope to a child of tender years; so that the defendants had the advantage of the instruction as though plaintiff had been an adult and in full possession of his faculties.

[3] At the request of plaintiff the court gave the following instruction: "Before the plaintiff can recover you must find from the evidence, first, that the dogs before the biting, or alleged biting of the plaintiff complained of, were of a vicious, *mischievous* propensity, and accustomed to biting mankind. Second, that the defendants had knowledge or notice of these characteristics." Appellants assert that the use of the word "*mischievous*" imports a wholly erroneous conception into the instruction. In support of their criticism counsel cite *Fries v. American Lead Pencil Co.*, 141 Cal. 610, [75 Pac. 164]. We cannot find therein any analogy to the facts in the instant case. The word did not add to or detract from the efficacy of the instruction.

No other points are discussed by appellants, and we find no error in the record.

Judgment affirmed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 3342. First Appellate District, Division One.—May 19, 1920.]

THE SEABOARD NATIONAL BANK OF SAN FRANCISCO, Respondent, v. LEO V. BELDEN et al., Defendants; FRED G. JONES, Appellant.

- [1] CORPORATIONS—STOCKHOLDER'S LIABILITY—ACTION ON ORIGINAL OBLIGATION—RENEWAL NOTES—EFFECT OF.—An action against the stockholders of a corporation to recover on their stockholder's liability is properly brought upon the original obligation of the corporation, notwithstanding the promissory notes evidencing such liability have been canceled and renewal notes issued, there having been no express agreement that the renewal notes should constitute payment and such notes not having been in fact paid.
- [2] ID.—INDORSEMENT OF NOTES AFTER MATURITY—LIABILITY OF STOCKHOLDERS.—The rights and liabilities of a stockholder of a corporation are not affected by the fact that certain promissory notes executed to the corporation are not indorsed by it over to and sold to another until after their maturity.
- [3] ID.—NATURE OF STOCKHOLDER'S LIABILITY—EFFECT OF GUARANTY.—The liability of the stockholders of a corporation is direct and primary, arising coincidentally with the debt of the corporation, and is not changed or affected by the existence of a guaranty.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. E. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. B. Rinehart for Appellant.

Chickering & Gregory for Respondent.

KOFORD, J., *pro tem.*—This is an appeal by the defendant Jones from a judgment in an action brought to recover on a stockholder's liability, as a stockholder of the Luther Burbank Company, a corporation. The indebtedness upon which this judgment against appellant was rendered was

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3. Nature of stockholder's liability for debts of corporation, note, 99 Am. Dec. 432.



evidenced by eight promissory notes, as follows: Five notes executed by the corporation to the plaintiff directly, and three notes executed to the corporation by Joseph H. Clark and subsequently indorsed over to and sold to the plaintiff by the corporation.

Appellant contends: First, that the five corporation notes were paid and extinguished by new notes given in their place; second, that the Clark notes were by the corporation indorsed to the plaintiff after maturity, and were taken by plaintiff subject to defenses, and third, that plaintiff had received a guaranty of all the liabilities of the corporation, and for that reason cannot enforce the liability of the appellant.

[1] The evidence upon the first point is to the effect that new notes were given in the place of the five original notes. The action was upon the original liability evidenced by these notes. The new notes were renewal notes. There is nothing in the evidence to support the contention that the original obligation, as evidenced by these five notes, was extinguished by the giving and accepting of new notes. The action was properly brought upon the original obligation, even though the original notes had been surrendered (*Bonestell v. Bowie*, 128 Cal. 511, [61 Pac. 78]; *Clarke v. Berlin Realty Co.*, 33 Cal. App. 50, [164 Pac. 333]), and there being no express agreement that the renewal notes should constitute payment, and such notes not having been in fact paid. (*Comptoir d'Escompte v. Dresbach*, 78 Cal. 15, [20 Pac. 28].)

[2] It is not apparent how appellant's rights are in any way affected by the Clark notes being indorsed by the corporation to the plaintiff after maturity. Such defenses as might exist would be in favor of the original maker, Clark. If the corporation had any defenses, appellant neither pleaded nor offered to prove them and has not even suggested what they are, to this time. But if there were any defenses, they would not be available to the corporation as indorser for value. The indorser's warranty would not permit it. (Civ. Code, sec. 3116.)

[3] Neither is there any merit in appellant's third point that the guaranty of the liability of the corporation is in any sense a defense available to appellant sued on stockholder's liability. The liability of the stockholders of a

corporation is direct and primary, arising coincidentally with the debt of the corporation, and is not changed nor affected by the existence of a guaranty. (*London & S. F. Bank v. Parrott*, 125 Cal. 472, [73 Am. St. Rep. 64, 58 Pac. 164]; *Eva v. Anderson*, 166 Cal. 420, [137 Pac. 16].)

The judgment appealed from is affirmed.

Waste, P. J., and Richards, J., concurred.

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[Civ. No. 2778. Second Appellate District, Division One.—May 19, 1920.]

PETER FERRARIS, Respondent, v. SOUTHERN PACIFIC COMPANY (a Corporation) et al., Appellants.

[1] COMMON CARRIERS—NEGLIGENT TRANSPORTATION OF BANANAS—FAILURE TO KEEP AT PROPER TEMPERATURE—EVIDENCE—INFERENCES—FINDING.—In this action to recover damages alleged to have been sustained by plaintiff on account of defendants' negligence in transporting a car of bananas, the testimony of the messenger who was in charge of the car that the same was kept at a proper temperature while en route, coupled with the testimony of others which tended to show that the damage resulted from leaving the car door open during the night after its arrival at the point of destination, was sufficient to justify the finding of the trial court to the effect that the deterioration of the fruit, which was delivered to the defendants at the point of shipment in good condition, was due to the failure of the defendants to keep the same under proper refrigeration, and such evidence was not overcome by the inferences sought to be drawn from a report as to the varying outside temperatures along the line of travel.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Henry T. Gage, W. I. Gilbert and Floyd S. Sisk for Appellants.

Frederick R. Levee and W. R. Law for Respondent.

SHAW, J.—Action to recover damages alleged to have been sustained by plaintiff on account of defendants' negligence in transporting a car of bananas from New Orleans to Los Angeles. Judgment went for plaintiff, from which defendants appeal, claiming the evidence is insufficient to justify the finding of the court to the effect that the deterioration of the fruit, delivered to defendants at New Orleans in good condition, was due to the failure of defendants to keep the same under proper refrigeration.

[1] Testimony received on the part of plaintiff was to the effect that in shipping bananas in carload lots it is necessary to place them in charge of a messenger, as was done in this instance, whose duty it is to maintain a temperature inside the car of fifty-eight or sixty degrees, which is done by the opening and closing of plugs and vents, depending upon the outside temperature, which varies along the route of travel. The testimony also tends to show that the messenger in charge of the car properly looked after the ventilation thereof, which arrived in Los Angeles at 8:20 P. M., December 13, 1917, with the fruit in good condition; that the damage to the bananas occurred between the time of arrival on December 13th and 8:30 A. M., December 14th, and was caused by the fact that, due to defendants' negligence, one door of the car had during the night been opened and left in that condition, as a result of which the fruit was badly chilled and spoiled. As against this evidence, which, if true, was ample to justify the finding, defendants introduced a report made by the messenger in charge as to the degrees of temperature through which the fruit was transported from New Orleans to Los Angeles, and which, it is claimed, shows the inaccuracy of his testimony. From this report it appears that the outside temperature along the route of travel varied from twenty degrees to sixty-eight degrees above zero, and that the inside temperature, so far as shown by the report, was not less than fifty-four degrees above zero, and the difference between the outside and inside temperature, so far as shown by this report, and in the absence of a stove or other means of heating, varied from four degrees to eighteen degrees; for instance, at one point when the outside temperature was sixty degrees, it was sixty-four degrees inside, and at another point, when the outside temperature was thirty-six de-

grees, it was fifty-four degrees inside. At one point along the line, however, the outside temperature is shown to have dropped to twenty degrees, and at another point twenty-two degrees, without any showing made by the report as to the inside temperature at such times, and hence appellants' claim that the inside temperature must have dropped to forty degrees or less, which it is conceded was so low that the fruit would have been damaged, and that such damage must be attributed to the negligence of the messenger. While the argument is plausible, it omits from consideration the length of time during which the low outside temperature of twenty degrees at one point and twenty-two at another prevailed, and also ignores the degree of heat generated inside the car by reason of the bananas being packed in bulk, the extent of which, according to the testimony, depends upon the density of the loading and other varying conditions. It is a well-recognized fact that fruit for a *short time* will stand a low degree of temperature without damage, when, under a temperature several degrees higher but prevailing for a *longer time*, damage will result from the cold. Hence, since the injury due to the low temperature would depend upon the duration thereof, we cannot assume the direct testimony overcome by the mere showing that en route the car passed through a zone where the outside temperature was twenty or twenty-two degrees and therefore the temperature on the inside of the car dropped and continued at a point, as a result of which the fruit was damaged.

We agree with the trial court that the direct testimony of the messenger in charge of the car, and others, which tends to show that the damage resulted from leaving the car door open during the night of December 13th, after its arrival in Los Angeles, is not overcome by the inferences sought to be drawn from the report as to the varying outside temperature along the line of travel.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2954. Second Appellate District, Division One.—May 19, 1920.]

G. M. PRATT, Respondent, v. J. M. PADGETT, Appellant.

[1] LANDLORD AND TENANT—USE OF PREMISES FOR UNLAWFUL PURPOSE—DAMAGES—KNOWLEDGE OF LANDLORD—ESTOPPEL.—A lessor is estopped to claim damages from the lessee due to the fact that the latter has conducted a gambling house in a residence leased by the former to the latter, thereby injuring the reputation of the house, where the lease of said premises was with the intention of both parties that the same should be so used.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. L. Johnson for Appellant.

H. V. Richardson for Respondent.

SHAW, J.—From a judgment for \$265 entered in favor of plaintiff, the defendant has appealed upon the judgment-roll.

The findings, in so far as applicable to the cause of action upon which the judgment was rendered, are as follows: On February 28, 1918, plaintiff was the owner, entitled to, and in possession of certain personal property consisting of tables, pictures, stools, cushions, water and wine glasses, cuspidors, a quantity of assorted liquors, one ice-box, two thousand chips, and a faro card-case and check-rack, of the value of \$265, all of which defendant on said date wrongfully and unlawfully took possession of and converted to his own use. That these findings fully support the judgment rendered is not open to the slightest question.

[1] It is true that, in response to the allegations of a cross-complaint filed by defendant, wherein he sought a judgment against plaintiff for damages due to the fact that plaintiff had conducted a gambling house in a residence

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1. Effect of landlord's knowledge that tenant intends to use premises for purposes of gaming, note, 19 L. R. A. (N. S.) 662.

leased to him by defendant, thereby injuring the reputation of the house, as to which the court found that such lease of said premises so made by defendant to plaintiff was with the intention of both parties that the same should be so used, and hence, as held by the court, defendant was estopped from claiming damages by reason of such use. In other words, as to defendant the court applied the well-recognized rule that no recovery can be had by either party to a contract having for its object the violation of law. As said in *Dunn v. Stegemann*, 10 Cal. App. 38: "Where it appears that a contract has for its object the violation of law, the court should *sua sponte deny any relief to either party.*"

The lease of the house for an unlawful purpose, so far as shown by the findings, had no connection with defendant's act in wrongfully converting plaintiff's property to his own use, and which presumably he took to reimburse himself for the alleged damage sustained. For aught that appears to the contrary, the property converted might have been elsewhere than in the building let by defendant to plaintiff and which was used for gambling purposes. However this may be, there is nothing in the findings which brings the unlawful act of defendant within the rule invoked by appellant.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

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[Civ. No. 2049. Third Appellate District.—May 19, 1920.]

J. D. BAILIFF, Appellant, v. A. M. HILDEBRANDT,  
Respondent.

- [1] **DEFAULT—MOTION TO SET ASIDE—FAILURE TO ACCOMPANY WITH COPY OF ANSWER.**—Where the notice of motion to vacate and set aside the default of a defendant and the judgment entered thereon against said defendant is not accompanied by the answer, or other pleading proposed to be filed therein, as provided in section 473 of the Code of Civil Procedure, and no answer, or other pleading, is served upon the plaintiff or offered to the clerk for filing, the motion should be denied.

**[2] ID.—APPEAL—BILL OF EXCEPTIONS—PLEADINGS—PRESUMPTION.—**

Where the bill of exceptions on appeal from an order granting a motion to set aside the default of a defendant and the judgment entered thereon does not show that an answer was served upon the plaintiff or offered to the clerk for filing, and the certificate of the judge states that it "contains the statement of all papers and evidence used in the above-entitled matter," and the stipulation of the attorneys is "that the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced and of all of the proceedings had upon the hearing of the above-entitled motion," it cannot be presumed, in favor of the order of the trial court, that an answer was served or filed.

**APPEAL** from an order of the Superior Court of Sonoma County granting a motion to set aside a default and the judgment entered thereon. Thos. C. Denny, Judge. Reversed.

The facts are stated in the opinion of the court.

Hiram E. Casey, L. R. Lambert and Casey & Lambert for Appellant.

W. F. Cowan for Respondent.

**NICOL, P. J., pro tem.**—This is an appeal by plaintiff from an order vacating and setting aside the default of defendant and the judgment entered thereon against the said defendant.

The motion to set aside the default and judgment was one under section 473 of the Code of Civil Procedure and in substance was made upon the ground of mistake, inadvertence, and excusable neglect. The defendant's demurrer to the complaint was overruled by the court on December 9, 1918, and by the order he was given ten days within which to answer. On December 26, 1918, the defendant not having answered in compliance with the said order, his default was entered and on the same day judgment was duly entered for the amount prayed for in the complaint, together with costs; execution was issued and levied upon moneys belonging to the defendant and the judgment by virtue thereof was fully paid and satisfied on the twenty-sixth day of December, 1918. On June 2, 1919, defendant filed his notice of motion to set aside the said default and judgment. The motion

came on for hearing before the court on June 16, 1919, and was on said day by the court granted.

The notice of motion stated that it would "be made and based upon all the records, papers, and files and proceedings in this action, and upon this notice and the affidavit of defendant and of W. F. Cowan which is served and filed herewith, and upon such oral and documentary evidence as may be offered . . ." No copy of any answer, or other pleading proposed to be filed, accompanied said notice of motion. Section 473 of the Code of Civil Procedure, as amended in 1917 (Stats. 1917, p. 242), provides that an application like the one in the case at bar "must be accompanied with a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted." The supreme court, in speaking of this amendment in the case of *Los Angeles County v. Lewis*, 179 Cal. 398, [177 Pac. 154], said: "The plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event that leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court. Substantial compliance with the provision of course requires such production in connection with the application for relief."

In this case of *Los Angeles County v. Lewis*, no copy of the answer was served with the notice of motion to set aside the default, but the defendant two days before the giving of the notice of motion offered his proposed answer for filing and left the same in the custody of the clerk and served the same by delivery of a copy on the adverse party. The notice of motion stated that this was the answer that the defendant desired to file and that the motion would be based in part on the same and the affidavit of the defendant, a copy of which was served with the notice of motion, showed that the answer that the defendant desired to be filed was the one which the defendant had offered for filing and which had remained in the custody of the clerk. The supreme court held that this was a compliance with the said amendment and that "the provision of section 473 of the Code of Civil Procedure, here involved, like the remainder of the section, must be liberally construed with a view to substantial justice, and we are of the opinion that it must



be held that, in view of the facts stated, the application for relief was 'accompanied' with a copy of the answer proposed to be filed."

[1] In the case at bar, as before stated, no copy of any answer, or other pleading proposed to be filed, accompanied defendant's notice of motion, nor does the record anywhere show that any answer, or other pleading, was served upon the plaintiff or offered to the clerk for filing. There was no compliance made by defendant with the said provision.

[2] The respondent argues that the record or bill of exceptions must affirmatively show that no other evidence was offered than that stated in the bill of exceptions, and that in the absence of such showing it will be presumed in support of the order of the court that an answer was filed. Conceding that respondent's argument in this respect is sound, nevertheless we are of the opinion that the record in this case sufficiently shows that no other evidence was offered on this motion than that which is contained in the bill of exceptions. The certificate of the judge to the bill of exceptions states that it "contains the statement of all papers and evidence used in the above-entitled matter" and the stipulation of the attorneys is, "that the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced and of all of the proceedings had upon the hearing of the above-entitled motion."

It follows that the order appealed from should be reversed and it is so ordered.

Hart, J., and Burnett, J., concurred.

[Civ. No. 3439. First Appellate District, Division Two.—May 19, 1920.]

**ARCHIE G. WILLIAMS, Respondent, v. A. R. G. BUS COMPANY (a Corporation), Appellant.**

- [1] **NEGLIGENCE—ACTION FOR DAMAGES—PERSONAL INJURIES—VERDICT NOT EXCESSIVE.**—In this action for damages for personal injuries sustained by plaintiff when an automobile bus owned and operated by the defendant, and in which plaintiff was riding as a passenger, overturned, in view of the injuries plaintiff received and the damage done to his clothes, the nervous shock suffered by him, the time he spent in the hospital, then in bed at his home, and then during which he was unable to resume his work and the hospital and doctor's bills incurred, the amount of damages allowed was not so grossly excessive as to call for the interference of an appellate tribunal.
- [2] **ID.—EXCESSIVE DAMAGES—POWER OF APPELLATE COURT.**—The power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.
- [3] **ID.—PASSION OR PREJUDICE—DISREGARD OF INSTRUCTIONS—EXCESSIVE VERDICT—REMEDY—PROCEDURE.**—In an action for damages for personal injuries, if the defendant considers the verdict the result of passion or prejudice, or a disregard of the instructions of the court, it cannot raise the point for the first time on appeal, but must bring this matter before the attention of the trial court on a motion for a new trial.
- [4] **ID.—PAIN AND SUFFERING—ADMISSIBILITY OF STATEMENTS BY PLAINTIFF.**—In an action for damages for personal injuries sustained by plaintiff when an automobile bus owned and operated by the defendant, in which plaintiff was riding as a passenger, overturned, testimony by the wife and the mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering is properly admitted.

**APPEAL** from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. Affirmed.

The facts are stated in the opinion of the court.

1. Excessiveness of verdicts in actions for personal injuries other than death, notes, 16 Ann. Cas. 8; Ann. Cas. 1913A, 1361; Ann. Cas. 1915D, 488; Ann. Cas. 1916C, 916; L. E. A. 1915F, 30.

Duke Stone for Appellant.

Ralph E. Swing for Respondent.

LANGDON, P. J.—This is an appeal by the defendant from a judgment against it in the sum of fifteen hundred dollars, recovered by plaintiff as damages for personal injuries. The plaintiff was riding as a passenger in an automobile bus owned and operated by the defendant between Ontario and Riverside, California, when the automobile overturned.

[1] The first point raised by the defendant is that the damages are excessive. The testimony shows that the plaintiff received a cut about an inch deep in the hip, which required a closure of the wound with stitches; that his back was wrenched and strained; that his leg and arm were bruised, and that his body was rendered stiff and sore, and his nervous system shocked by reason of his experience; that at the time of the trial he was still suffering from this nervous shock which made him constantly apprehensive in the performance of his work of driving an automobile. He spent nine days in a hospital, and was confined to his bed at his home for two weeks additional. He was unable to resume his work for six weeks, and his clothing, including an overcoat and suit, were ruined. He also incurred hospital and doctors' bills. Under such circumstances, we think the verdict of fifteen hundred dollars is not so grossly excessive as to call for the interference of an appellate tribunal. [2] It has been repeatedly held in this state that the power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. (*Bond v. United Railroads*, 159 Cal. 270, [Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366]; *Hale v. San Bernardino etc. Co.*, 156 Cal. 716, [106 Pac. 83]; *Wheaton v. North Beach etc. Co.*, 36 Cal. 591; *Varcoe v. Lee*, 180 Cal. 338, [181 Pac. 223].)

In the case of *Bond v. United Railroads*, *supra*, it is said: "The trial court should be vigilant to set aside verdicts where there is reason to believe this has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant. We have

cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. (Citing cases.) Practically, the trial court must bear the whole responsibility in every case."

[3] Furthermore, it appears that the appellant made no motion for a new trial. If it considered the verdict the result of passion or prejudice, or a disregard of the instructions of the trial court, its remedy lay first in a motion for a new trial addressed to the trial court. It is said in the case of *Chiarini v. Rochon*, 1 Cal. Unrep. 540, that if this matter is not brought before the attention of the trial court in a motion for new trial, it is too late to raise the point for the first time on appeal. It is stated in *Bond v. United Railroads*, *supra*: "If a motion for a new trial on this ground is properly and regularly interposed, that court would have power to reduce or set aside the verdict. In the absence of such motion, it should have granted the plaintiff's motion to render judgment for four thousand five hundred dollars, unless the amount was so obviously the result of passion, prejudice, or a disregard of the instructions as to justify the court in ordering a new trial of its own motion. *As it did not do so, it is to be presumed that there was no cause for such action.*"

[4] Appellant also complains of the admission of testimony by the wife and mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering. This testimony was properly admitted under a well-recognized rule of evidence. (1 Greenleaf on Evidence, 16th ed., sec. 162a et seq., p. 254; *Green v. Pacific Lumber Co.*, 130 Cal. 435, [62 Pac. 747]; *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, [86 Pac. 830]; *Lange v. Schoettler*, 115 Cal. 388, 393, [47 Pac. 139].)

There are no other assignments of error which require discussion.

The judgment is affirmed.

Brittain, J., and Nourse, J., concurred.

[Civ. No. 3375. First Appellate District, Division Two.—May 19, 1920.]

**E. M. GORDON et al., Respondents, v. C. D. HILLMAN et al., Appellants.**

- [1] **FOREIGN JUDGMENTS—ACTION ON IN THIS STATE—CONSTITUTIONAL LAW—JURISDICTION.**—While, under article IV, section 1, of the constitution of the United States, which requires courts of one state to give full faith and credit to the judgments of a sister state, suit may be maintained in this state on a final judgment rendered in another state, that clause of the constitution applies to records and proceedings of courts only so far as they have jurisdiction. The jurisdiction of the court rendering the judgment is always open to inquiry under proper averments where its conclusiveness is questioned in another state.
- [2] **ID.—RESISTANCE TO ACTION ON—FRAUD—WANT OF JURISDICTION.**—An action on a judgment rendered in another state may be resisted on the ground of fraud which goes to the jurisdiction of the court to render the questioned judgment either with respect to the subject matter or of the person, or which constitutes a fraud upon the law of the forum, or which operates to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it.
- [3] **ID.—SETTING ASIDE OF—REVERSAL OF DEFAULT JUDGMENT BASED ON.**—If the original judgment rendered in a sister state has been set aside prior to the making of a motion to set aside a default judgment rendered thereon in this state, such default judgment will be reversed as a matter of right and restitution will be awarded to the defendant.
- [4] **ID.—SETTING ASIDE OF FORMER JUDGMENT—EFFECT OF—RIGHT OF JUDGMENT DEBTOR.**—The effect of setting aside a former judgment is the same as where suit is brought on a judgment which is thereafter reversed on appeal when the judgment debtor is entitled to have the second judgment set aside as of record and as of right.
- [5] **ID.—PENDENCY OF PROCEEDINGS TO VACATE—MOTION TO VACATE DEFAULT JUDGMENT BASED ON—RIGHT OF DEFENDANT.**—While a motion made under section 473 of the Code of Civil Procedure is addressed to the discretion of the court and its action will not be disturbed on appeal, unless it shall be made clearly to appear that such discretion has been abused, such a motion to set aside a default judgment entered in an action to recover upon a judg-

2. Right to resist judgment of sister state on ground of fraud, notes, *Ann. Cas.* 1914D, 999; 32 L. R. A. (N. S.) 939.

ment rendered in a sister state should be granted, where the motion is made within the six months limited by that section and it is shown that proceedings are pending in the sister state to set aside the original judgment on the ground of fraud and the issue of fraud is tendered by the answer accompanying the notice of motion.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Reversed.

The facts are stated in the opinion of the court.

Arthur C. Vaughan for Appellants.

Harold E. Thomas for Respondents.

BRITAIN, J.—The defendants appeal from an order denying motion to vacate a default judgment in the superior court in Los Angeles in a suit to recover some forty thousand dollars upon a judgment alleged to have been rendered in the superior court of King County, in the state of Washington, on January 5, 1918.

Judgment was entered on June 4, 1918. Notice of motion to vacate the default judgment was given on November 9, 1918. It was accompanied by an affidavit of the defendant and a copy of the proposed answer. The judgment of the Washington court was attacked on the ground of fraud. It is stated in the affidavit that the defendant Hillman was not aware of the fact that he and his codefendant had a good and substantial defense to the action in Los Angeles until May 20, 1918. It further appears that on May 25, 1918, proceedings were commenced in the Washington court to vacate and set aside the original judgment. The defendants advised their attorney that they had done so and instructed him to file an answer on their behalf in the Los Angeles suit, setting up the alleged fraud upon them as a defense therein. It is alleged they relied entirely upon their attorney to protect their interests in this connection and to prepare and file all necessary papers and pleadings and that they believed he had taken, and would take, such steps as were necessary and proper to protect their interests; that they did not know of the entry of the default or of the judgment by default until June 20, 1918, when they were advised by their attorney that they might move at any

time within six months to vacate the judgment; that this statement was coupled with the advice that the defendants should delay making their motion in the Los Angeles court, so that the Washington court might have an opportunity to pass upon the proceedings instituted there prior to the hearing of the motion in Los Angeles. It appears, inferentially, at least, that the proceedings to vacate the judgment were pending in the Washington court at the time of the hearing of the motion which was denied on November 20, 1918. Reference is made in the appellants' brief to a decision rendered by the supreme court in the state of Washington on December 30, 1919, the effect of which was to cause the vacation of the judgment on which the suit in the Los Angeles court was based. (*Gordon v. Hillman*, 109 Wash. 223, [186 Pac. 651].) Considered as a matter of fact, the action of the Washington court, after the determination of the motion in the Los Angeles court, can be given no consideration. When the motion was made, however, within the six months limited by section 473 of the Code of Civil Procedure, it appeared that the proceedings to vacate the Washington judgment were pending.

[1] From the showing made on behalf of the defendants, it appeared that the judgment on which the suit was brought was a final judgment, having been affirmed by the supreme court of Washington. Suit on such a judgment may be maintained under constitutional provisions requiring courts of one state to give full faith and credit to the judgments of a sister state. (Const., art. IV, sec. 1.) That clause of the constitution applies to records and proceedings of courts only so far as they have jurisdiction. (*Board of Public Works v. Columbia College*, 17 Wall. 521, [21 L. Ed. 687, see, also, *Rose's U. S. Notes*]; *Pennoyer v. Neff*, 95 U. S. 714, [24 L. Ed. 565]; *Renaud v. Abbott*, 116 U. S. 217, [29 L. Ed. 629, 6 Sup. Ct. Rep. 1194].) The jurisdiction of the court rendering the judgment is always open to inquiry under proper averments where its conclusiveness is questioned in another state. (*Knowles v. Logansport etc.* 19 Wall. 58, [22 L. Ed. 70]; *Simmons v. Saul*, 138 U. S. 439, [34 L. Ed. 1054, 11 Sup. Ct. Rep. 369]; *Brown v. Fletcher*, 210 U. S. 82, [52 L. Ed. 966, 28 Sup. Ct. Rep. 702]; *Hancock's Estate*, 156 Cal. 804, [134 Am. St. Rep. 177, 106 Pac. 58].) [2] Since fraud may go to the very

question of jurisdiction, a judgment rendered in another state may be resisted on the ground of fraud which goes to the jurisdiction of the court to render the questioned judgment either with respect to the subject matter or of the person, or which constitutes a fraud upon the law of the forum, or which operates to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it. (32 L. R. A. (N. S.) 939, note.)

Enough facts to resist a general demurrer appear in the answer proposed to be filed at the time of the hearing of the motion to vacate the default to show fraud in obtaining the judgment on which the suit was brought in a matter affecting the jurisdiction of the court. [3] If the original judgment had been set aside prior to the motion, the default judgment rendered in this state would have been reversed as a matter of right and restitution would have been awarded to the defendant. (*Merchants Ins. Co. v. De Wolf*, 33 Pa. St. 45, [75 Am. Dec. 577]; *Davidson v. Smith*, 1 Biss. 352; *Faber v. Hovey*, 117 Mass. 108, [19 Am. Rep. 398].) [4] The effect of setting aside a former judgment is the same as where suit is brought on a judgment which is thereafter reversed on appeal when the judgment debtor is entitled to have the second judgment set aside as of record and as of right. (*Heckling v. Allen*, 15 Fed. 196; *Banning v. Taylor*, 24 Pa. St. 297; *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107; *Mann v. Aetna Ins. Co.*, 38 Wis. 114; *Ward v. Marshall*, 96 Cal. 155, [31 Am. St. Rep. 198, 30 Pac. 1113]; dissenting opinion of Justice Olney in *Re Riccardi*, 182 Cal. 681, [189 Pac. 696].)

If within six months after the entry of the default judgment the supreme court of Washington had vacated the original judgment, that fact would have been a sufficient reason for vacating the default judgment. If the default judgment should be held good, the subsequent action of the supreme court of Washington would have required its vacation under the rules announced in the cases which have been last cited. If the Washington judgment had been set aside before the default was entered, that fact properly pleaded would have constituted a bar to the prosecution of the California suit. It is not the purpose of the law to deprive litigants of the right to have their cases deter-



mined upon their merits, nor to invite new litigation to overturn judgments. While the affirmative allegations of the proposed answer were denied in counter affidavits, the trial court was in no position to determine the merits of the case nor to adjudge finally, in the absence of evidence, upon the truth of the formal allegations and denials. It clearly appeared both that proceedings were pending in Washington to set aside the judgment, which was the basis of the California suit, and that the issue of fraud was tendered by the proposed answer. The application amounted to a plea in abatement in a case where, but for the pendency of the Washington proceedings, a plea in bar must have been held good. [5] While a motion made under section 473 of the Code of Civil Procedure is addressed to the discretion of the court and its action will not be disturbed on appeal, unless it shall be made clearly to appear that such discretion has been abused, under the circumstances shown by the record, the motion to vacate the default judgment made within the six months limited by the code section should have been granted.

The order appealed from is reversed.

Nourse, J., and Langdon, P. J., concurred.

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[Civ. No. 3369. First Appellate District, Division Two.—May 20, 1920.]

SUSIE M. KIBBE et al., Respondents, v. AMY GRAVES et al., Appellants.

[1] **APPEAL—ALTERNATIVE METHOD—ABSENCE OF JUDGE'S CERTIFICATE.**

Where an appeal is taken under the alternative method, but the judge's certificate is not attached to the reporter's transcript, in accordance with the provisions of section 953a of the Code of Civil Procedure, the appeal must be considered by the appellate court merely as an appeal upon the judgment-roll alone.

[2] **JUDGMENT—CHANGED FACTS—RES ADJUDICATA.**—The fact that the

court in one action decides that the sheriff might proceed with a sale under execution of the contingent interest of a judgment debtor in certain real property held by a trustee for the benefit of certain creditors of such judgment debtor does not render that

question *res adjudicata* in a subsequent action instituted after such a judgment debtor has ceased to have any interest in the property.

- [3] **TRUSTS—CONTINGENT INTEREST OF TRUSTEE—SALE ON EXECUTION—EFFECT OF SALE BY TRUSTEE—TITLE TO PROPERTY.**—Where real property is conveyed to a trustee for the benefit of certain creditors of the grantor, with power to manage and sell said property and to apply the proceeds to the payment of said debts, and to pay the balance, if any, over to the grantor, such grantor, up to the time of sale, has a contingent interest in the property, which may be levied upon and sold under execution, but upon a sale by the trustee, pursuant to the terms of the trust, the purchaser acquires both the legal and the equitable title to the property, discharged of all trusts, the contingent interest of the original grantor in the property being changed into a contingent interest in the proceeds of the sale, provided any exists after the purposes of the trust have been fulfilled.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. Franklin Baxter and A. J. Mitchell for Appellants.

Charles M. Ackerman for Respondents.

LANGDON, P. J.—This is an appeal by the defendants from a judgment in favor of the plaintiffs in an action to quiet title to certain real estate in the county of Los Angeles, and also from orders denying a new trial and refusing to vacate the judgment.

[1] The respondent, at the outset, objects to a consideration of the reporter's transcript for the reason that the judge's certificate is not attached thereto, in accordance with the provisions of section 953a of the Code of Civil Procedure. It is contended that as only the certificate of the clerk is attached to the transcript, and as the clerk is only qualified to certify to the judgment-roll, therefore this appeal must be considered by this court merely as an appeal upon the judgment-roll alone. We think this objection is well taken and that the appeal can be considered only upon the judgment-roll. (*Christenson Lumber Co. v. Seawall*, 157 Cal. 405, [108 Pac. 276]; *Knoch v. Haizlip*, 163 Cal. 20, [124 Pac. 997]; *Lane v. Tanner*, 156 Cal. 135, [103 Pac. 846].)

However, in the present case, as pointed out by the appellant, the consideration of the judgment-roll involves a consideration of practically all the material evidence contained in the reporter's transcript. The transcript contains the judgment-roll in the present action, and also a grant deed, judgment-rolls in two prior actions and a sheriff's return upon execution in yet another action between the parties. These documents are substantially set out, in their legal effect, in the pleadings, and the facts with reference to them were found by the court. The effect of judgments in cases Nos. B-38190 and B-40999 are pleaded, the grant deed from McMahan, trustee, to the plaintiffs is referred to in the pleadings and is described therein, except as to the consideration stated in said deed. The recital of a consideration of \$36,641.85 in said deed (which deed is set out in the transcript) is the one point excluded from our consideration upon this appeal by the absence of the judge's certificate, which the appellant contends is material to her case. It may not be inappropriate for us to say, in passing, that we think a consideration even of this matter would not change our determination in any way for the reasons which shall appear hereinafter.

The facts of the case are complex. Many matters are set up in the pleadings which occurred in actions between the same parties previous to this action, and in the interest of clarity, we shall discuss the events as found by the court, in the order of their occurrence, and without regard to the order in which they are pleaded.

On August 21, 1915, one Florence E. Rickershauser was the owner of the real property involved in the present action. At that time she was insolvent and executed a deed to one McMahan covering said property, which conveyance was duly recorded on December 3, 1915. On August 27, 1915, McMahan executed a declaration of trust with reference to said property, declaring that he held the same not in his own right, but as trustee for certain creditors of the grantor, the names of the creditors and the amounts of their claims being set out in the declaration of trust; that he held the same for the benefit of said creditors with power to manage and sell said property and to apply the proceeds to the payment of said debts, and to pay the balance, if any, over to the grantor, Florence E. Rickershauser.

On May 18, 1916, defendant Amy Graves instituted an action (No. B-38190) against E. E. Denton and Florence E. Rickershauser, and recovered a judgment therein for \$3,474.24. On July 11, 1916, a writ of execution was issued upon said judgment, and the sheriff levied upon the property involved herein, as the property of Florence E. Rickershauser, and published a notice of sale to be held on August 31, 1916. On August 8, 1916, McMahan instituted an action (No. B-40999) against the sheriff to restrain him from selling said property, and alleged that the property was held by him in trust for the benefit of certain creditors of Florence E. Rickershauser, and that Florence E. Rickershauser had no right, title, or interest therein. In this action Amy Graves intervened and by her complaint in intervention and the answer thereto, there was put in issue the questions of the validity of the deed from Florence E. Rickershauser to McMahan, and the validity and purposes of the trust declared by him to attach to said property. It was adjudicated in that action that the conveyance from Rickershauser to McMahan was *bona fide* and not in fraud of creditors; that it was impressed with a trust in accordance with the trust declaration hereinbefore referred to; that Florence E. Rickershauser was entitled to whatever beneficial interest remained in the trust property after the payment of the claims enumerated in the trust declarations, and that McMahan was, therefore, not entitled to a permanent injunction against the sheriff to restrain him from selling whatever beneficial interest Florence E. Rickershauser had in the property.

Thereafter, in pursuance of the trust agreement, the property was sold by the trustee McMahan on July 30, 1917, and the sale confirmed by the court, and the purposes of the trust accomplished by the payment of the debts. On August 30, 1917, the sheriff proceeded with the execution sale to satisfy the judgment in said action No. B-38190, in accordance with the judgment in case No. B-40999. Amy Graves purchased at said sale, all the right, title, and interest of Florence E. Rickershauser in and to said property. A certificate evidencing said sale was issued to the purchaser by the sheriff, but a deed has not yet been executed by the sheriff conveying said interest so purchased. It will be observed from this statement of facts, that before Amy Graves

made her purchase at the sheriff's sale, the property had already had sold to the plaintiffs under the power given in the trust agreement, and the proceeds from said sale had been used in the extinguishment of the debts of Florence E. Rickershauser, the said sale under the trust deed had been confirmed by the court and the trustee discharged, according to the allegations of the pleadings and the findings of the court. At the time Amy Graves purchased the beneficial interest of Florence E. Rickershauser she had notice of the conveyance to plaintiffs made under the power contained in the trust agreement, as said conveyance to plaintiffs was duly recorded.

All of the above facts are preliminary to a discussion of the present suit, but they all appear from the pleadings and findings in the present action. In the present action the plaintiffs, who are the grantees of McMahan under the power given him in the trust agreement, seek to quiet title to the land against the defendant, and they also set out in their complaint the facts regarding the execution sale under which the right, title and interest of Florence E. Rickershauser was sold to Amy Graves, and allege that the sheriff will execute a deed to said Amy Graves on August 30, 1918, in consummation of said sale unless restrained by the court, and that such deed, if executed, will cloud the title of the plaintiffs to their property, and they ask that the sheriff be restrained from executing this deed. In other words, the plaintiffs seek to litigate the question of whether or not Florence E. Rickershauser had any beneficial interest in the land in controversy at the time of defendant's purchase, and to restrain the sheriff from executing the deed to defendant until such matter may be determined—so as to keep unclouded the title of the plaintiffs to the land. It is also alleged that the value of the property is something over \$30,000, and that the interest of Florence E. Rickershauser was sold at sheriff's sale for about \$2,600, and plaintiffs offer to redeem from said sale if it be adjudged that Florence E. Rickershauser had any beneficial interest in said property at the time of the purported sale to Amy Graves. It is also alleged that the plaintiffs purchased the property in good faith from Thomas T. McMahan, trustee, and paid therefor \$33,641.85. Amy Graves filed an answer denying the title of plaintiff and setting up title in herself by virtue

of the execution sale. She also makes various allegations in her answer and cross-complaint as to matters decided in action B-40999 with reference to the fraud of Florence E. Rickershauser in conveying to McMahan, and the validity of McMahan's conveyance to plaintiffs, all of which we need not discuss here, as these questions were decided adversely to the defendant Amy Graves in said action No. B-40999, and such matters are *res adjudicata* as between these parties.

The trial court in the present action issued a permanent injunction restraining the sheriff from clouding the title of the plaintiffs by issuing the deed to the defendant.

[2] One of the main contentions of the appellant is that the injunction should not have been issued because she asserts that it was decided in said action B-40999 that the sheriff might proceed with the sale and sell the beneficial interest of Florence E. Rickershauser in the property. The facts bearing upon this question as they existed at the time of the determination in action B-40999, and as they exist in the present action are materially different, and therefore the question is not *res adjudicata* here. In action B-40999, McMahan was the plaintiff. He held the legal title then to the property in controversy, holding the same under specific trusts as found by the court, and Florence E. Rickershauser was a possible beneficiary under the trust. She had a contingent interest in the property, for at that time it had not yet been sold under the power given to the trustee. This possible beneficial interest of Florence E. Rickershauser was an asset, upon which it was proper for Amy Graves to levy at that time, and she could not be restrained from doing this. If it had been necessary to sell only a part of the property to satisfy the debts set out in the trust agreement, then the residue would have belonged to Florence E. Rickershauser under the terms of the trust agreement, and her contingent interest would have become vested. This contingent interest was something which could have been reached by the judgment creditor of said Florence E. Rickershauser. In the present action, however, the situation has changed. McMahan no longer holds the property under a trust in which Florence E. Rickershauser has any possible interest. The property has been sold. Plaintiffs have purchased the property at the trustee's sale. They allege and

the court found that they paid value for it. There is no longer in existence any interest of Florence E. Rickershauser in the property, for it was necessary to sell all of the property to pay the debts. [3] The error of the appellant is in assuming that when McMahan sold under the trust deed to the plaintiffs in execution of the trust the plaintiffs took only the *legal* title, subject to the beneficial interest of Florence E. Rickershauser. The plaintiffs took both the legal and equitable title—the full and complete title, discharged of all trusts. This being true, the interest of Florence E. Rickershauser in the property became changed into an interest in the proceeds of the sale, provided any surplus existed after the purposes of the trust had been fulfilled. Whether there is such a surplus, and if so, who is holding it, and whether or not Amy Graves may levy upon it, are questions not in issue here. We are dealing merely with the title to this real property. As it has been found that it was regularly and properly sold to the plaintiffs for value in execution of a valid instrument of trust, the interest of Florence E. Rickershauser in said property is forever wiped out, and there was nothing, at the time of the purported sale by the sheriff, to convey to the defendant Amy Graves. In other words, the issuance of the deed by the sheriff would be a meaningless proceeding, conveying nothing and merely involving the plaintiffs in lawsuits to clear the record. Whatever interest Florence E. Rickershauser may have had in the property was converted into an interest in the proceeds of the sale, if such proceeds were more than the amount necessary for the payment of the debts. Appellant, however, does not attempt to pursue this possible interest in the proceeds of the sale, but insists upon having the property. It is for this reason that it becomes immaterial to the appellant that we may not consider upon this appeal the recital in the deed from McMahan to plaintiffs of the consideration of \$36,641.85—\$3,000 more than the amount of the debts specified in the trust declaration. Even though it be conceded that the trustee received for the property more than the amount of the claims specified in the declaration of trust, and that, therefore, there was a balance due Florence E. Rickershauser, yet we are not concerned with that balance here, and we do not see how the injunction granted in the present case interferes in any

way with defendant's right to pursue said money if it exists. The injunction restrains the sheriff "from executing a deed in favor of the said Amy Graves which if executed would purport to convey to her any beneficial interest of Florence E. Rickenshauser in and to the land or any part thereof involved in this action."

One further point is argued by the appellant, which has reference to the descriptions of the property contained in the various instruments involved in this action. The point is made merely with reference to the last parcel of real property set out in the complaint—parcel G. This parcel of land when it was conveyed by Florence E. Rickershauser to McMahan, trustee, was described as follows: "An undivided one-half interest in lots 1, 8, 9, 10, 11, 12, 13, 14, 16 and 24 in *Block 15 of the Breen Tract*, Wilmington." This same description was used in the deed from McMahan to plaintiffs; it was also used in the complaint to quiet title herein. It was the description found by the court to cover the land in controversy, in its findings of fact and conclusions of law, and in its judgment herein. It is the description contained in the injunction against the sheriff, and he is enjoined from executing a deed to defendant Graves of land described in that manner.

However, in the cross-complaint of Amy Graves filed herein, in which she sought to quiet title to this land and to have the deeds from Rickershauser to McMahan, and from McMahan to plaintiffs, declared void, this particular parcel of land is described as follows: "An undivided one-half interest in lots 1, 8, 9, 10, 11, 12, 13, 14, 16 and 24 of the *Breen Tract as per Book Fifteen, page forty-two of maps*." The execution in action No. B-38190 had been issued against this parcel described in this manner, and the sale by the sheriff was made to the defendant Graves under this description.

Because of this variation in the descriptions of the ten lots in the Breen Tract, appellant is taking the position that the property to which the plaintiffs are entitled under the deed from McMahan, and under the decree of the court quieting title, is not the same property under which execution was issued in action B-38190 and not the same property which defendant Graves purchased at the sheriff's sale. Therefore, they contend that, regardless of the judgment quieting



title according to the prayer of plaintiffs' complaint, defendant Graves is entitled to a deed to ten lots in the Breen Tract. There is nothing in the record from which this court can determine whether these certain ten lots "in the Breen Tract" and the ten lots numbered the same "in block 15 of the Breen Tract" are the same lots. If they are not, then obviously defendant may have her deed to the lots "in the Breen Tract," while the plaintiffs have their title quieted to the lots "in block 15 of the Breen Tract." But it requires no modification of the judgment to bring about such a result, because the injunction merely restrains the sheriff from executing a deed to these certain lots "in block 15 of the Breen Tract." It in no way interferes with his action in executing to the defendant Graves a deed to any different lots "in the Breen Tract" which she may have purchased.

The judgment is affirmed.

Nourse, J., and Brittain, J., concurred.

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[Civ. No. 3366. First Appellate District, Division Two.—May 20, 1920.]

LYNN C. BUXTON, Respondent, v. INTERNATIONAL INDEMNITY COMPANY (a Corporation), Appellant.

[1] **AUTOMOBILE INSURANCE—CONSTRUCTION OF LETTER AND POLICY TOGETHER.**—In this action on a policy of automobile insurance, a letter from the insurance company to the assured confirming the statements of one of its solicitors as to the protection given by that company and in which it agreed to insure against certain risks was properly held to constitute a part of each and every contract of insurance entered into by the assured after the date of such letter, unless expressly excluded from said contracts, where said policies were taken out in reliance thereon, notwithstanding said policies contained provisions in conflict therewith.

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1. Insurance covering automobiles against theft, robbery, and pilferage, notes, *Ann. Cas.* 1915A, 627; *Ann. Cas.* 1916A, 1128; *Ann. Cas.* 1917D, 53; 44 *L. R. A. (N. S.)* 75; 51 *L. R. A. (N. S.)* 584; *L. R. A.* 1915E, 579; *L. R. A.* 1917F, 543.

- [2] **ID.—USE OF WORD “STEAL” IN BROAD SENSE—INTENTION OF PARTIES—CONSTRUCTION OF POLICY.**—Where, from an examination of all the provisions of a policy of automobile insurance in the light of the circumstances connected with and preceding its issuance, such as the statements of the assured as to the risks he desired insurance against and the statements of the insurance company and its solicitor as to the protection given, it is apparent therefrom that the word “steal,” used by the insurance company in referring to the risks it would insure against, was intended to cover every form of wrongful taking by a conditional vendee, and not merely larceny, the policy will be construed accordingly.
- [3] **ID.—ACTION ON POLICY—REFORMATION OF CONTRACT—RECOVERY—PLEADING.**—A complaint seeking to revise or reform a contract and also to recover upon or enforce the same as revised or reformed states but one cause of action.
- [4] **ID.—CONVERSION OF AUTOMOBILE—ALLEGATIONS ON INFORMATION AND BELIEF—SUFFICIENCY OF.**—An allegation, on information and belief, that the conditional vendee of an autotruck, without the knowledge and consent of the vendor, removed the truck from the county, and from the state, and ever since has and does now conceal the same with the intent to injure and defraud the vendor, and that said vendee embezzled said truck and wrongfully converted the same to his own use, constitutes a sufficient allegation of conversion, as against a general demurrer.
- [5] **ID.—PROOF OF LOSS—WAIVER—PLEADING.**—In an action on a policy of automobile insurance, the complaint is sufficient, although no proof of loss is pleaded, where plaintiff pleads facts which constitute a waiver of proof of loss and these facts are not denied by the defendant.
- [6] **ID.—PLEADING CONTRACT ACCORDING TO LEGAL EFFECT—DENIAL OF ALLEGATIONS—ISSUES.**—Where the plaintiff, in such an action, pleads the contract of insurance according to its legal effect and such allegations are denied by the defendant, a finding of the trial court with relation to the intention of the parties to the contract in using a particular word, in defining the protection given, is within the issues made by the pleadings.
- [7] **ID.—EVIDENCE—BURDEN OF PROOF.**—An action to recover under a policy of automobile insurance against theft is a civil action and plaintiff is required to prove his case only by a preponderance of the evidence, the rule being the same as it is in civil cases generally.
- [8] **ID.—ATTEMPT TO RECOVER PROPERTY—PAYMENTS TO DETECTIVE AGENCY—RECOVERY OF.**—Where a policy of automobile insurance expressly provides that any act of the assured in recovering, saving, and preserving the property in case of loss or damage shall be considered as done for the benefit of all concerned and that all reasonable expenses thus incurred shall constitute a claim under

the policy, the assured is entitled to recover the amount paid a detective agency in attempting to recover the property.

[9] ID.—EQUITY OF VENDOR—INSURANCE OF—INTEREST—JUDGMENT.—

Where the interest or equity of the assured in the automobile is the amount of the unpaid installments plus interest thereon, the conditional sale contract having provided for the payment of interest on all deferred payments from the date of the contract, and the policy of insurance provides for the protection of that equity, the insurance company, in an action on such policy, may not object to the allowance of such interest in the judgment.

APPEAL from a judgment of the Superior Court of Los Angeles County. L. H. Valentine, Judge. Affirmed.

The facts are stated in the opinion of the court.

N. Blackstock, Edward M. Selby and W. I. Gilbert for Appellant.

John B. Yakey and Jack M. Hendrick for Respondent.

LANGDON, P. J.—This is an appeal by the defendant from a judgment for the plaintiff in an action to recover upon a contract of insurance. The court found that the contract of insurance entered into between the parties to this action consisted of a written agreement in the form of a letter dated June 8, 1916, signed by the secretary of the defendant company and addressed to the plaintiff, and of a policy of insurance set out in the complaint.

Plaintiff was a dealer in automobiles and entered into a contract with one Suttle, by which Suttle was to purchase a Stearns-Knight automobile for \$2,250, the purchase price to be paid in installments as provided in the contract, and the automobile to remain the property of the vendor until all payments had been made. Plaintiff applied to the defendant for insurance upon this automobile so contracted to be sold, and a policy was issued by the defendant on June 12, 1917. The insured named in the policy was "W. A. Suttle and/or N. R. Vail." According to the testimony and the findings, at the time of the issuance of the policy, the automobile covered thereby was the property of the plaintiff and said N. R. Vail had no interest whatever therein, but his name was inserted in the policy at the suggestion of the defendant's agent because plaintiff stated to said agent

of the defendant that Vail would advance money upon this purchase contract. The premium upon the policy was paid by the plaintiff and the policy was delivered to him. Vail for some reason did not advance money upon the contract and on June 26, 1916, an indorsement was made on said policy by the defendant company that it had received notice that the interest of Vail in the policy had been assigned to plaintiff, and loss, if any, was payable to W. A. Suttle and/or Lynn C. Buxton, as their interests may appear. Later the policy was assigned by plaintiff to T. E. Newlin as collateral security, and this assignment was approved by the insurance company. After the loss of the automobile, Newlin assigned his interest in said policy to plaintiff.

The testimony upon which the findings of the trial court are based shows that prior to June 8, 1916, Mr. Hallenbeck, who was soliciting business for the defendant, had a conversation with the plaintiff regarding his insurance business. Hallenbeck was seeking plaintiff's business and plaintiff complained to him about the technical defenses raised by insurance companies and the inadequate protection given by their policies, and told him that he desired to be fully protected in all cases of lease contracts. Hallenbeck promised that his company would fully protect the plaintiff if he would insure his automobiles with it, and stated, according to the plaintiff's testimony, that the policies of his company would be protection against "fire, theft, and wrongful conversion," and that he would have the company write to plaintiff to this effect. In accordance with this understanding, on June 8, 1916, H. Perk, Jr., secretary of defendant company, wrote to the plaintiff as follows: "I wish to advise you that the International Indemnity Company will from this date extend policies on all cars in which you may have an equity to cover any claims arising under the following conditions: . . . Third: If the conditional buyer of an automobile or any member of his immediate family should steal any automobile insured under our policies and thereby commit a felony, upon warrant being secured for the arrest of such party or parties, the company hereby agrees that your equity in any automobile insured by this company will be fully protected." Plaintiff's secretary testified that reliance was placed upon this letter and policies

of insurance were ordered from the defendant company with this understanding.

This instrument was never recalled, and plaintiff had received no notice at the time the policy in suit here was issued, nor thereafter, that this communication was not in full force and effect.

On or about September 15, 1917, Suttle, the vendee of the car, disappeared from Los Angeles, taking the car with him. The evidence regarding his alleged misconduct we shall discuss later. [1] Our first consideration is the contention of the appellant that the evidence does not support the finding of the trial court that the two documents mentioned here—the letter of June 8, 1916, and the policy issued June 12, 1917—constitute one contract. We think it clearly appears from the testimony of the plaintiff and his secretary that the policy was taken out in reliance upon and in consideration of the agreement made in the letter of June 8th, and that said letter became a part of each and every contract of insurance entered into between the parties after its date unless expressly excluded from said contracts. The policy of insurance itself provides, among other things, insurance against: "Theft, Robbery or Pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment whether the theft, robbery or pilferage occur during the hours of such service or employment or not, *and excepting also the wrongful conversion or secretion by a mortgagor or vendee in possession under mortgage, conditional sale, or lease agreement, . . .*"

[2] It was the contention of the plaintiff upon the trial that the language hereinbefore quoted from the letter of June 8th was intended to obviate the exception italicized above with reference to wrongful conversion or secretion by vendee in possession under conditional sale; and that the language of said letter: "If the conditional buyer . . . should steal any automobile insured under our policies . . . your equity will be fully protected," was intended by the parties and understood by them to cover wrongful conversion by said conditional buyer; that the word "steal" is used in its broad, general sense, and not in the technical sense of larceny. Plaintiff asked that the portion of the contract of insurance appearing in the letter be reformed to express the true intent and understanding of the parties.

The court found that the word "steal" was used by the parties to express the idea of wrongful conversion and reformed the contract accordingly. The matter could have been disposed of, as pointed out by respondent, under the power of the court to interpret contracts, for it appears from the testimony of the plaintiff's witnesses that the word "steal" must have been used by the parties in its broad and colloquial sense. It is unlikely that the plaintiff would have cared for an extension of insurance to cover a contingency which is almost impossible of occurrence. If appellant's view be taken, the defendant assumed practically no risk at all in guaranteeing the plaintiff against larceny by a conditional vendee of an automobile covered by his contract of purchase. The conditional vendee would have lawful possession of the car, and his misappropriation thereof would be embezzlement or wrongful conversion. It is difficult to imagine how he could commit larceny in connection therewith, for this offense involves unlawfulness in taking possession. Appellant enlightens us upon this point by arguing that if the contract of purchase was entered into for the purpose of stealing the car, then the original possession would be unlawful and the act would be larceny. It seems unlikely that the plaintiff desired insurance against a situation such as this. The necessary elements of such an offense to bring it within the terms of such a policy would be most difficult of proof. Furthermore, the direct testimony of the plaintiff is that he desired and was assured that he would receive protection against wrongful conversion by his vendee. It is not surprising that a layman, upon reading the letter of June 8th, would think its language covered this situation. It is also not necessary that parties to a contract should express themselves in the most technical and precise terms; it is sufficient if their meaning clearly appears.

Section 3401 of the Civil Code provides that in revising a written instrument the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be. Section 504a of the Penal Code provides that every person who shall fraudulently remove, conceal, or dispose of any personal property or effects of another in his possession under a contract of purchase not yet fulfilled is guilty of

embezzlement. Although the word "steal" ordinarily imports larceny, it may be shown to import a charge of embezzlement. (*Taylor v. Short*, 40 Ind. 511.) The word "steal" can be shown in the connection in which it is used not to import larceny. (26 Am. & Eng. Ency. of Law, 2d ed., 770; *Dunnell v. Fiske*, 52 Mass. (11 Met.) 551, 554.) The term "steal" "is commonly used in indictments for larceny . . . and denotes the commission of theft. But, in popular usage, 'stealing' seems to be a wider term than larceny, inasmuch as it may include the unlawful appropriation of things which are not technically the subject of larceny." (Black's Law Dictionary.) It is said in *Darling v. Clement*, 69 Vt. 292, 297, [37 Atl. 779], that the natural and obvious meaning of the word "steal" is a felonious taking of property by larceny, but it may be qualified by accompanying words so as to show that such was not the meaning. In the present case, we think that when the word "steal" was accompanied by the qualifying words, "by a conditional buyer," that these qualifying words clearly extended the word "steal" so as to make it include embezzlement, a crime which is consistent with the legal right of possession in the vendee under a conditional contract of purchase.

Furthermore, if the contract contained in said letter be construed as appellant desires, merely to cover a technical theft by a conditional purchaser, or, as stated by the appellant: "Only to cover a case where there was a felonious intent at the time that the automobile purchaser acquired possession," then the owner was already protected against such a situation by the policy proper, and without the addition of the letter of June 8th, and therefore the portion of the contract contained in the letter is meaningless and useless. For the policy itself provides against theft by any and every one excepting only persons in the assured's household or employment. There is no exception made as to theft by one having a conditional contract of purchase, and if we concede the possibility of such an offense, then no exception is made of it in the policy. The only thing that is excepted with regard to the conditional purchaser is "wrongful conversion." Therefore, it appears that if the letter of June 8th added any protection against the actions of the conditional purchaser, it must have been by making inoperative this exception against wrongful conversion.

We therefore agree with the trial court in its holding that the contract was intended by the parties to cover unlawful conversion by the vendee.

It may be appropriate to point out here, in answer to certain arguments made by appellant, that the finding of the trial court is that in drawing the contract between the parties to this action, it was the intention of the parties that this contract should cover and fully protect the plaintiff against the embezzlement or wrongful conversion of any automobile covered by any insurance policy issued by the defendant, and that said letter or contract of June 8, 1916, was given by defendant company to the plaintiff for the purpose and with the intention to protect the said plaintiff against wrongful conversion or embezzlement of any automobile so sold by plaintiff under conditional sales contract. This finding is sufficient to sustain the judgment, and it is immaterial whether or not the other portion of the finding to the effect that by inadvertence and mistake the word "steal" was used instead of the words "wrongful conversion and embezzlement" is technically sustained by the evidence or not. If the parties intended that the word "steal" should be used in its broad and colloquial sense and cover certain risks out of which this loss grew, that is sufficient, and it is unnecessary that the record show the parties actually intended to use the express words, "wrongful conversion," but by mistake used the word "steal."

Many of the other objections of the appellant are technical ones, and we shall discuss them briefly. Appellant contends that its demurrer should have been sustained because the complaint contains two causes of action which were not separately stated. The court found, contrary to appellant's premise upon this argument, that the letter and contract constituted one and the same contract. As before stated, we are in accord with this conclusion. [3] A complaint seeking to revise or reform a contract and also to recover upon or enforce the same states but one cause of action. (*Messer v. Hibernia Sav. & Loan Society*, 149 Cal. 122, [84 Pac. 835].)

[4] Appellant also contends that the complaint does not sufficiently allege the conversion of the automobile by Suttle, and therefore fails to allege loss. The complaint alleges: "As this plaintiff is informed and believes, and therefore



alleges the fact to be, the said W. A. Suttle, without the knowledge or consent of this plaintiff, removed from Los Angeles, and the state of California, the said automobile and ever since has and does now conceal the same with the intent to injure and defraud this plaintiff." This is an allegation upon information and belief of sufficient facts to constitute embezzlement under our code. And it is further alleged in the complaint, upon information and belief, that the said Suttle "embezzled said automobile and wrongfully converted the same to his own use." An allegation of material facts upon information or belief is a sufficient allegation. (Sec. 446, Code Civ. Proc.; *McDermont v. Anaheim etc. Water Co.*, 124 Cal. 112, 115, [56 Pac. 779].) The objection to this allegation was taken by general demurrer, and the allegations of the complaint we think are sufficient against such attack.

[5] Appellant also contends that the complaint is insufficient because no proof of loss is pleaded. Plaintiff pleaded facts which constitute a waiver of proof of loss, and these facts were not denied by the defendant. Plaintiff alleged that on September 24, 1917, he notified the defendant in writing of the loss or disappearance of the automobile and that within sixty days from the date of the loss the defendant denied liability upon the policy upon the ground that the policy did not cover embezzlement or wrongful conversion. Appellant seeks to avoid the effect of this waiver by asserting that its denial of liability was under the policy alone, and it did not have in contemplation the letter of June 8, 1916, which was held by the trial court to be a part of the policy; that, therefore, they never denied liability under the contract recovered upon here and therefore never waived proof of loss. The answer to this contention is that the defendant was aware of all the facts and is presumed to know the law. Since the court has held that the two instruments constituted one contract, defendant's denial of liability under the contract was a denial of liability under both instruments.

[6] Another objection of appellant is that the finding of the trial court with relation to the intention of the parties to the contract in using the word "steal" is outside of the issues made by the pleadings. This argument is made because the complaint alleged, among other things, that the de-

fendant had contracted and agreed with the plaintiff in consideration of the plaintiff purchasing insurance from the defendant to attach to each and every policy then in existence held by plaintiff or that might thereafter be issued a rider or agreement protecting the plaintiff against wrongful conversion by purchasers under conditional contracts of sale. It is true that the trial court found against this allegation of the complaint, and plaintiff did not recover upon this theory of the case. But it is not true that the complaint contained no allegations sufficient to place in issue the question of the meaning of the word "steal" as contained in the letter of June 8, 1916. Upon examination of the complaint, we find an allegation that the defendant in consideration of the payment of a certain premium executed and delivered to the plaintiff a policy of insurance against all direct loss or damage which he might sustain caused by the wrongful conversion of said automobile by the vendee under said executory contract. This is pleading the contract according to its legal effect and these allegations were denied by the defendant. In determining the legal effect of this contract which was found to be made up of the policy and letter of June 8, 1916, the court necessarily determined the meaning of the language used in the light of the intention of the parties to the contract. This portion of finding 4 was therefore in issue, and it is the basis of the judgment.

The only other objection of the appellant which we find it necessary to discuss here is that the evidence does not justify the finding that Suttle converted the automobile to his own use and removed the same from the state of California and does now retain and conceal the same with intent to injure and defraud the plaintiff. The evidence in the case shows (and there is no evidence to the contrary) that Suttle took the automobile out of this state without the consent or knowledge of the plaintiff; that he concealed the same so that the plaintiff is unable to locate it, although he employed detectives who followed Suttle about to several cities and endeavored to locate the car; that plaintiff demanded of Suttle either payment of the installments due or possession of the car, and this demand has not been complied with; that the payment due on September 15, 1917, the day when the automobile was taken from the state has

not been made, and no subsequent payment has been made, although several months elapsed between the time of its disappearance and the institution of this action. It is apparent from this testimony that Suttle exercised dominion over the automobile which was inconsistent with the rights of the true owner. (*Fitzgerald v. State*, 50 N. J. L. 475, 477, [14 Atl. 746]; *People v. Goodrich*, 142 Cal. 220, [75 Pac. 796].) [7] An action to recover under a policy of automobile insurance against theft is a civil action and plaintiff is required to prove his case only by a preponderance of the evidence, the rule being the same as it is in civil cases generally.

[8] The objection that the plaintiff should not have recovered the \$126.26 paid to the detective agency in attempting to recover the automobile is met by the express terms of the policy that any act of the assured in recovering, saving, and preserving the property in case of loss or damage shall be considered as done for the benefit of all concerned and all reasonable expenses thus incurred shall constitute a claim under this policy. The portion of the contract contained in the letter of June 8th provides for the protection of plaintiff's equity in the car. [9] Plaintiff's equity in the car was the amount of the unpaid installments plus interest thereon; for the terms of the conditional contract of sale provided for the payment of interest upon all deferred payments from the date of the contract. Appellant may not, therefore, object to the allowance of such interest in the judgment.

The judgment is affirmed.

Brittain, J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Civ. No. 2784. Second Appellate District, Division One.—May 20, 1920.]

PIONEER TRUCK COMPANY (a Corporation),  
Respondent, v. H. W. HAWLEY, Appellant.

[1] REPLEVIN — PLEADING—POSSESSION—FINDINGS—ISSUES—APPEAL—PRESUMPTION.—On an appeal on the judgment-roll alone from a judgment in favor of the plaintiff in an action to replevin an auto-truck, although the complaint failed to touch upon the subject of possession of the property by defendant at the commencement of the action, or the implication of such possession was very defectively conveyed, but such defect was not raised by demurrer, it will be presumed in favor of the judgment and findings of the trial court showing defendant's possession of the truck at the commencement of the action, that such fact was, at the trial, treated as a fact within the issues and properly to be determined by the court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Wm. D. Dehy, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. McD. Spencer and Jensen & Jensen for Appellant.

Warren E. Libby for Respondent.

CONREY, P. J.—The plaintiff brought this action to recover judgment for possession of a certain described auto-truck, or the value thereof if a return cannot be had, and for damages. Judgment having been entered in favor of the plaintiff, the defendant appeals therefrom, and the case is brought here upon the judgment-roll alone.

Appellant claims that it nowhere appears, either from the complaint or the findings, that appellant ever had possession of the property sought to be recovered, and that for that reason the judgment should be reversed. He relies upon the rule that in an action of this kind the plaintiff cannot recover without alleging and proving that at the time of commencement of the action the property was in possession of the defendant. (*Riciotto v. Clement*, 94 Cal. 105, [29 Pac. 414].)

In the case at bar the only allegations touching the defendant are that, at a stated time a few days prior to the commencement of this action, the plaintiff demanded possession of said property from the defendant, and that defendant has failed, refused, and neglected to deliver the same to the plaintiff; "that plaintiff is damaged by the unlawful holding of said property in the sum of twenty-five dollars for each and every day the same has been withheld since said seventeenth day of January," etc. The answer of the defendant was equally noncommittal and silent on the subject of defendant's possession of the truck, but denied the allegations above noted. The findings of fact affirm the demand by plaintiff, the failure and refusal of defendant to deliver the property to plaintiff, and declare that the plaintiff is damaged in a stated sum by the detention of said truck. In the "conclusions of law" it was further stated that the defendant "withholds possession thereof unlawfully from said plaintiff."

[1] If the complaint does not wholly fail to touch upon the subject of possession of the property by defendant at the commencement of the action, it must at any rate be admitted that the implication of such possession is very defectively conveyed. Respondent contends, however, that since no demurrer was filed in the case, and since the court made findings as above stated, and it is not made to appear that any question was raised in the court below concerning the sufficiency of the complaint, that this court must now assume, in favor of the findings and judgment, that the fact of defendant's possession of the truck at the commencement of the action was, at the trial, treated as a fact within the issues and properly to be determined by the court. On this ground we think that the judgment should be sustained. In *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 324 et seq., [147 Pac. 90], this subject is fully discussed. There it was conceded that the complaint failed to show a certain fact without which the action would not lie; nevertheless it appeared that the case had been tried and determined upon the theory that the issue was presented in the case. The court held that a defendant should not be permitted to stand by and, without objection, allow an issue to be tried as though properly presented by the pleadings, and on appeal escape the consequences by claiming that the complaint

failed to present such issue, The difference between that case and this is that there the facts as to the conduct of the trial and the manner in which the evidence was received were before the court of appeal, whereas in the present case we have only the judgment-roll. But in *Gervaise v. Brookins*, 156 Cal. 110, [103 Pac. 332], the supreme court, upon a consideration of the pleadings and findings alone, determined that it appeared with reasonable certainty that the case was tried upon the theory that the answer put in issue the value of certain property, although technically that issue had not been properly presented by the pleadings. That being so, the court denied to the appellant the right to have the point considered that there was no such issue. The case of *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 297, [47 Pac. 60], was cited wherein "the presence in the record of a finding of fact which it was claimed was not in issue, was considered a sufficient showing that the cause was tried upon the theory that the fact was in issue."

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 19, 1920, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Civ. No. 3122. Second Appellate District, Division One.—May 20, 1920.]

WM. L. GLOCKNER, etc., Appellant, v. PALACE AMUSEMENT COMPANY (a Corporation), Respondent.

- [1] JUDGMENTS—ACTION ON INSTALLMENT CONTRACT—FRAUD—ADVERSE FINDING—SUBSEQUENT ACTION—DEFENSES—ESTOPPEL.—Where the court, in an action to recover certain unpaid monthly installments due under a contract for the purchase of a motion picture orchestra, finds adversely to the defendant as to its allegation of fraudulent acts of plaintiff which are set up as a defense, the defendant is thereby estopped to allege said facts as a defense to a second action by plaintiff to recover subsequent unpaid monthly installments.
- [2] ID.—FORMER JUDGMENT AS ESTOPPEL—PLEADING—PROOF.—In such subsequent action it is not necessary that plaintiff plead the former judgment as an estoppel, but when the defendant by his answer tenders the same issue presented in the former action, plaintiff is entitled to offer evidence of the facts constituting such estoppel.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

Smith & Breslin for Appellant.

Wm. T. Blakely for Respondent.

SHAW, J.—Action to recover certain unpaid monthly installments of money alleged to be due under a contract for the purchase by defendant from plaintiff of a motion picture orchestra.

Judgment went for defendant, from which plaintiff appeals.

For defense to the action defendant relied upon certain alleged fraudulent acts practiced by plaintiff, whereby defendant was induced to enter into the contract, as to all of which the court found in defendant's favor.

[1] It appears that prior to the institution of the action there had been another action between the same parties and

upon the same contract to recover monthly installments of money theretofore accruing thereon and which defendant had failed to pay. In this first action the defendant, as here, pleaded in defense of recovery therein the same fraudulent acts of plaintiff which it sets up in its answer in the instant case, and, as shown by the judgment-roll in said first action, introduced in evidence, the court, as to such defense, found adversely to defendant and gave judgment for plaintiff, which judgment had, at the time of filing the complaint herein, become final. Hence, the court having in the trial of the first case adjudged as unavailing the defense of fraud therein pleaded, defendant must, in the second suit, upon the principle of estoppel, be deemed concluded thereby. While the subject of the action in this case was different installments from those involved in the former action, the defense to recovery thereof was the same in both; hence, as said in *Kochler v. Holt Mfg. Co.*, 146 Cal. 335, [80 Pac. 73]: "The case comes clearly within the principle that a judgment operates as an estoppel to preclude the parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them." Indeed, we know of no authority holding to the contrary, while the proposition is, among other cases, supported by *Baker v. Eilers Music Co.*, 175 Cal. 657, [166 Pac. 1008]; *Wiese v. San Francisco Musical Society*, 82 Cal. 645, [7 L. R. A. 577, 23 Pac. 212], and *Williams v. Hawkins*, 34 Cal. App. 146, [166 Pac. 869].

[2] Respondent attempts to avoid the result by suggesting that plaintiff did not plead the former judgment as an estoppel. A sufficient answer to this is that he could not anticipate that defendant would, as a defense, plead facts which had been theretofore, on issue joined, adjudged against it; and hence when defendant by answer tendered the same issue, he was entitled, without pleading the judgment, to offer evidence of the facts constituting the estoppel.

Our views render it unnecessary to notice other points. The judgment is reversed.

Conrey, P. J., and James, J., concurred.



[Civ. No. 3368. First Appellate District, Division Two.—May 20, 1920.]

**SECURITY MORTGAGE COMPANY (a Corporation),**  
Respondent, v. **JOHN DELFS et al., Defendants; CON-**  
**TINENTAL NATIONAL BANK OF LOS ANGELES**  
(a Corporation), Cross-complainant and Appellant.

- [1] **MORTGAGES—ACTION TO FORECLOSE—DELIVERY OF NOTE AND MORTGAGE BY ASSIGNEE TO PAYEE—CONFLICTING EVIDENCE—FINDING—APPEAL.**—In an action to foreclose a mortgage, a finding of the trial court that after the payee of the note had executed an assignment of the note and mortgage on a separate paper, the assignee under such assignment voluntarily redelivered the note and mortgage to the payee, if based upon conflicting evidence, is conclusive on the appellate court.
- [2] **ID.—FRAUD—NEGLIGENCE—INJURY TO TWO INNOCENT PARTIES—WHO MUST SUFFER—EQUITY.**—As between two innocent parties who have both suffered from the fraud of a third the loss must fall where the course of business has placed it, if no fault or negligence is imputable to either party; but where the fault or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by the one who by his conduct has rendered the injury possible.
- [3] **ID.—REDELIVERY OF NOTE AND MORTGAGE BY ASSIGNEE TO PAYEE—SUBSEQUENT ASSIGNMENT TO ANOTHER FOR VALUE—WANT OF NOTICE—ESTOPPEL.**—Where, after a note and mortgage are assigned on a separate paper by the payee to a bank as security for the payment of an independent debt, the bank voluntarily delivers the note and mortgage to the payee thereof without any notation thereon showing its claim, and without recording the assignment to it or giving notice to the mortgagors of such assignment, and thereafter the payee assigns the note and mortgage to another, who takes the same prior to the recordation of the assignment to the bank, in good faith, for value, and without any notice of any prior claim, the bank is estopped from claiming ownership as against such subsequent assignee.
- [4] **ID.—ORDER OF RECORDATION OF ASSIGNMENTS IMMATERIAL—CONSTRUCTION OF CODE.**—In such case, the equities of the respective assignees are not rendered equal because the subsequent assignee does not record his assignment until after the holder of the first assignment has recorded his, where the latter is not injured by the failure to record such subsequent assignment; neither is such subsequent assignment void under section 1214 of the Civil Code, as

against the assignee under the prior assignment, who places his assignment of record first, as the latter is not a "subsequent purchaser" within the meaning of that section.

- [5] **ID.—ASSIGNMENT TO TWO INNOCENT PARTIES—PRIORITY OF TRANSFER AND RECORDATION—NEGLIGENCE—FRAUD—RIGHTS OF PARTIES.** When a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation or other notice of either assignment, as between the two innocent parties the priority of the transfer and of the recordation or other notice is important only when the equities are equal; but where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

The facts are stated in the opinion of the court.

Kemp, Mitchell & Silberberg for Appellant.

Swanwick & Donnelly, S. E. Vermilyea and J. W. Swanwick for Respondent.

**NOURSE, J.**—Defendant and cross-complainant appeals from a judgment in favor of plaintiff foreclosing a mortgage executed by the defendants John and Rosa Delfs to one Gore, in February, 1917, and assigned by him to appellant in March, 1917, and thereafter on July 26, 1917, assigned by Gore to respondent. The facts material to the case are that, after the execution and delivery of the note and mortgage, Gore, the payee thereof, assigned both on a separate paper to appellant as security for the payment of an independent debt due from Gore to appellant; that thereafter and on July 18, 1917, appellant, acting through its regularly employed note teller, delivered the note and mortgage to Gore, taking his receipt therefor; that on July 26, 1917, Gore assigned the note and mortgage to respondent as security for the payment of ten thousand dollars borrowed by him from respondent at that time; that thereafter and on the twenty-first day of September, 1917, appellant duly recorded its assignment of March, 1917, and four days later respondent's assignment of July 26th was recorded. The

action was commenced by respondent to foreclose the mortgage so assigned to it and appellant intervened, claiming to be the owner of the note and mortgage as a prior assignee.

The trial court found that respondent was the owner of the note and mortgage at the time of the trial, that appellant was estopped from claiming ownership, and that the note and mortgage had been voluntarily delivered to Gore by appellant. These findings are attacked by appellant—the first two as being insufficient to support the judgment, the last as not being supported by the evidence.

[1] First giving consideration to the attack upon the finding of voluntary delivery of the note and mortgage, it appears that the evidence was conflicting, a portion of it having been given by deposition and this being contradicted by appellant's witnesses during the course of the trial. The evidence was that the documents were voluntarily delivered to Gore by the regularly employed note teller of the bank, who took Gore's receipt upon a printed form of receipt for collateral furnished him by the bank for the purpose. The teller testified that he had been specially authorized by the bank president to so deliver collateral to Gore whenever he wanted it and that it was a customary and frequent thing to do if the particular form of receipt was signed. The only conflict in the evidence as to this point was in the testimony of one of the witnesses for appellant to the effect that the authority given the note teller was restricted so that he should not permit Gore to take the documents away from the bank premises. Upon such conflict this court is bound by the finding of the trial court.

With this finding taken as conclusive, the evidence is that, on the eighteenth day of July, 1917, appellant, while then having possession of the note and mortgage as security for an indebtedness of Gore to appellant, voluntarily delivered them to Gore, indorsed in blank by Gore, the payee thereof, with nothing appearing upon either document to indicate that appellant, or anyone other than Gore, had any interest in them; that appellant permitted the note and mortgage to remain in the possession of Gore without recordation of its assignment or notice to the mortgagors until some six months after its execution; that the loan of respondent to Gore was made in good faith, for a valuable consideration, and without notice or knowledge that anyone

other than Gore claimed any interest in the note and mortgage; and that the loan would not have been made by respondent if appellant had not permitted Gore to assume possession of the documents free from any notice of adverse claims.

Upon this showing it is argued that appellant was negligent in failing to record its assignment prior to the transfer to respondent, in failing to give notice to the mortgagors, and in delivering the documents to Gore without some notation thereon showing its claim. From this it is argued that, as respondent was an innocent purchaser for value and without notice, appellant is estopped by its own negligence from asserting its claim, or that, the loss having occurred through appellant's negligence, it must be the one to suffer.

[2] As between two innocent parties who have both suffered from the fraud of a third the loss must fall where the course of business has placed it, if no fault or negligence is imputable to either party. But where the fault or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by the one who by his conduct has rendered the injury possible. (10 R. C. L., p. 695.) This is in effect a restatement of the well-known maxim of jurisprudence found in section 3543 of our Civil Code that "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

[3] The doctrine so expressed is often referred to as estoppel by negligence, which is not strictly correct because some of the essential elements of estoppel are lacking in ordinary negligence. But it makes little difference by what term the rule is designated. If the facts found are sufficient to bring the conclusion of law within the rule the judgment must be affirmed. Here the findings of fact amply support the conclusion that respondent was the innocent party and that the loss occurred through the negligence of appellant. The note and mortgage were made payable to Gore and bore every evidence of title and transferability in him. Respondent made inquiry of the mortgagors to ascertain if they had any equitable defenses against the apparent liability and ascertained that they had none. This was all that prudence in the ordinary course of business required. If appellant

had recorded its assignment or had given notice thereof to the mortgagors, its rights could have been protected. "The policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and encumbrancers." (*Smitton v. McCullough*, 182 Cal. 530, [189 Pac. 686].) [4] But appellant argues that the equities are equal because respondent also was negligent. The only negligence ascribed to respondent in the briefs is its failure to record its assignment prior to recordation by appellant. But negligence without injury is of no avail to appellant. Upon its theory of the case, if respondent had so recorded its assignment, appellant would have been without any remedy whatsoever, while the failure to record did not injure appellant.

The facts of the case differ materially from those in *Chase v. Whitmore*, 68 Cal. 545, [9 Pac. 942]; *Kohn v. Sacramento Elec. Gas etc. Co.*, 168 Cal. 1, [141 Pac. 626]; and *Crocker Nat. Bank v. Byrne & McDonnell*, 178 Cal. 329, [173 Pac. 752]; because in each one of those cases the securities were taken from the true owner by fraud or theft, whereas in the case at bar the note and mortgage were assigned to appellant as security for the payment of another independent debt and the pledgee voluntarily released its security to the pledgor without fraud on the part of anyone acting for the pledgee. Furthermore, as Gore was the payee of the note, he was, so long as it remained in his possession at least, the apparent if not the true owner. Under such circumstances respondent was not required to make inquiry of all the world to see if others had some prior claim.

There remains for consideration the question of the effect of the recordation acts upon the rights of the parties. Appellant contends that respondent's assignment must be held void because under section 1215 of the Civil Code an assignment of a mortgage upon real property must be treated as a conveyance within the meaning of section 1214 of the Civil Code, which provides that every such conveyance is void "as against any subsequent purchaser . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded." But assuming that the section includes an assignment of a mortgage, appellant was not a "subsequent purchaser" within the meaning of the section, the purpose of which is to protect the interests of the innocent purchaser

as against the claim of the prior owner who has failed to avail himself of the protection afforded him by the statute of giving notice to the world by the recordation of the conveyance. But even so, these sections of the code were enacted at the same time as section 2934 of the same code, which provides that "an assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." Here again is the evident purpose to make the recordation of the assignment notice to those subsequently deriving title. "There is no provision as to prior assignees, or that the recordation should have 'like effect' as recordations of grants." (*Adler v. Sargent*, 109 Cal. 42, 49, [41 Pac. 799].) The effect of the recordation of a grant of real property is fixed by section 1107 of the Civil Code, which favors the one who, in good faith and for a valuable consideration, has acquired title by an instrument that is first duly recorded. There is no express provision in the code to the effect that the recordation of an assignment of a mortgage on real property shall in itself operate to defeat the title of an innocent assignee for value who took without notice and prior to the recordation. Inasmuch as section 2934 relates specifically to assignments of mortgages and was adopted concurrently with sections 1214 and 1215 of the Civil Code, the effect of recordation of an assignment must be that prescribed therein, namely, notice to those subsequently deriving title. And such must be the rule in view of the decision in the *Adler* case, which has been accepted as the judicial interpretation of that section. [5] From this it follows as a rule of law that when a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation or other notice of either assignment, as between the two innocent parties the priority of the transfer and of the recordation or other notice is important only when the equities are equal. But where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer.

The judgment is affirmed.

Brittain, J., and Langdon, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 17, 1920, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 3135. Second Appellate District, Division One.—May 20, 1920.]

ALMEDA BRESEE HYMAN, Respondent, v. KARL STERN COMPANY (a Corporation), Appellant.

- [1] CORPORATIONS—FIXING OF SALARIES—NONCOMPLIANCE WITH BY-LAWS—VALIDITY OF AGREEMENT BETWEEN OWNERS.—Where two persons who own and control a corporation to all substantial effect agree upon the salaries to be paid to each of them, such agreement is valid and binding, notwithstanding the by-laws of the corporation declare that the salaries of the officers and employees should be fixed by the board of directors.
- [2] APPEAL—EXCESSIVE JUDGMENT—NECESSITY FOR REVERSAL.—In an action to recover for amounts of salary alleged to be unpaid, where the amount for which the court gave judgment is in excess of the amount shown by the evidence to be due to the plaintiff, which condition arose through an error in the findings of fact, the judgment must be reversed by the appellate court, as it cannot direct an amendment of findings of fact.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

Benjamin W. Shipman and Henry O. Wackerbarth for Appellant.

James E. Kelby for Respondent.

JAMES, J.—Plaintiff brought this action to recover on two counts for amounts of salary alleged to be unpaid to her

by the defendant corporation. Judgment was in her favor, and defendant has appealed.

It was shown in evidence that, about the 1st of April, 1917, Karl Stern, who was then conducting a business similar to that which was and theretofore had been engaged in by the plaintiff, proposed to the plaintiff that she consolidate her business with that of Stern. The terms of consolidation were agreed upon and the defendant corporation was formed and shares issued in the proportion of ten to Stern and one to plaintiff. Some few shares were placed in the hands of an employee for the purpose of making a third director. Stern characterized himself as the manager of the concern. By-laws were adopted, among which was one containing the provision that salaries of the officers and employees should be fixed by the board of directors. It does not appear that the directors formally acted under that provision. As a part of the arrangement between the plaintiff and Stern, the matter of salaries to be drawn by each of them was considered and it was agreed that Stern should receive fifty dollars per week and the plaintiff twenty-five dollars. However, according to the plaintiff's testimony, Stern said that as the business needed capital he and the plaintiff should not draw the full amount of their salary at the start, and, agreeing to that suggestion, plaintiff for the first year drew but fifteen dollars per week. At the end of the first year a meeting of the stockholders was held and an advance of two dollars and fifty cents per week was allowed on account of the salary to be paid to the plaintiff. Plaintiff, from April 1 to August 10, 1918, drew seventeen dollars and fifty cents per week. At the latter date she ceased to render any services and later brought this action. In her complaint she claimed the right to recover the unpaid ten dollars per week for the first year's work and twelve dollars and fifty cents per week for that period of time from April 1, 1918, to August 10th of the same year.

[1] The first contention of appellant is that the condition of the by-law declaring that the directors should fix the salaries of officers and employees was not complied with, and that any arrangement entered into between Stern and the plaintiff as to salaries to be paid was invalid. We think there is no merit in this contention. If the two persons who owned and controlled the corporation to all substantial effect



agreed upon the salaries to be paid, where the corporate form was adopted only as a convenient agency for the handling of the business, such an agreement, we think, was valid and binding. Plaintiff testified that Stern and she "were the only ones concerned"; and further, that when she suggested that some minutes be made on the books of the corporation setting forth the amount of salaries, Stern replied that it was not necessary and that his attorney had so advised him. The association of the two individuals constituted practically a partnership, the corporate organization being a mere agency to be used in conducting the business. As to whether the agreement to pay the added compensation had been made as alleged and testified to by the plaintiff was for the trial court to determine, as the evidence was conflicting on that point. There was ample evidence to sustain the finding that such agreement had been made. [2] However, the amount for which the court gave judgment is in excess of the amount shown by the evidence to be due the plaintiff. This condition no doubt arose through error in preparing the findings, but it necessitates a reversal of the judgment, as we cannot here direct an amendment of findings of fact. The court's findings followed the allegations of the complaint, particularly as to the second cause of action, which covered the period of service between April 1, 1918, and the tenth day of August, 1918. The complaint alleged that between those dates plaintiff received only fifteen dollars per week, when her own testimony showed that she received seventeen dollars and fifty cents. Hence the findings are not sustained by the evidence and the amount of the judgment, under the facts, should be reduced.

For the reason given, the judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 3131. Second Appellate District, Division One.—May 20, 1920.]

L. J. MOSLEY, Appellant, v. WILL H. SEELY,  
Respondent.

- [1] **PROMISSORY NOTE—ACTION ON—DEFENSE—AGREEMENT TO REPURCHASE INTEREST IN INVENTION—FINDINGS—SUFFICIENCY OF EVIDENCE.**—In this action to recover upon a promissory note executed by defendant to plaintiff and his copartner as part consideration for the transfer to defendant by them of a one-third interest in an invention for the improvement of cameras, the evidence was sufficient to justify the findings of the trial court to the effect that plaintiff and his copartner agreed to repurchase the defendant's interest in the invention on or about a specified time, if the latter desired to sell, and that defendant, at the time specified, did elect to sell, and thereafter did sell, his interest in the invention to plaintiff and his copartner, and the latter paid to defendant a given sum of money on account of such repurchase, which amount the court properly added to the amount of the note sued on in determining the balance due defendant.
- [2] **PATENTS—HOW ASSIGNED—CONSTRUCTION OF UNITED STATES STATUTE.**—Section 4898 of the Revised Statutes of the United States, providing that an interest in a patent cannot be assigned except by an instrument in writing, has reference solely to patents or an interest therein, and not to an invention which has not been and may never be patented.

**APPEAL** from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. Affirmed.

The facts are stated in the opinion of the court.

Allison & Dickson for Appellant.

Cecil H. Phillips for Respondent.

**SHAW, J.**—Action to recover upon a promissory note for \$500 made by defendant to plaintiff and one H. K. Fairall, in which, as alleged in the complaint, Fairall transferred his interest therein to plaintiff, who was the legal holder thereof, and all of which remains unpaid.

The answer not only raised issues as to the ownership of the note and nonpayment thereof, but alleged that the note

was in part consideration for a transfer to him by plaintiff and Fairall of a one-third interest in an invention for the improvement of cameras, for which at the time he paid \$500 in cash and gave the note in question; that thereafter by mutual consent he reconveyed the interest, whereupon the obligation was rescinded.

[1] Further answering and as a counterclaim, he alleged that at the time of the making of the note plaintiff and Fairall gave him a written agreement that in case he should desire to sell the interest and improvement in cameras so transferred to him on September 8, 1914, which was the date of the note, they would repurchase the same on or about January 15, 1915, at the price so paid by him; that thereafter, to wit, on or about January 14, 1915, he elected to sell the same back to them and so notified Fairall and plaintiff, who repurchased his interest for the sum of \$1,000, upon which they paid the sum of \$250, leaving a balance due and unpaid of \$750, all of which allegations plaintiff by answer denied.

Upon the issues so tendered, the court made findings adverse to plaintiff and gave judgment thereon in favor of defendant, from which plaintiff appeals, claiming the evidence is insufficient to support certain findings. These findings are, first, that plaintiff is not the legal holder and owner of the promissory note. As appears from the record, the note was made payable to H. K. Fairall and L. J. Mosley, by both of whom it was indorsed and, therefore, like a note payable to bearer, subject to transfer by mere delivery with intent to pass title thereto. (*Meyer v. Foster*, 147 Cal. 166, [81 Pac. 402]; *Eames v. Crosier*, 101 Cal. 260, [35 Pac. 873].) Conceding, however, that this and the further finding that the payees of the note agreed that they would not transfer the same are without support of evidence, the error could not affect the judgment, since the note was not transferred and, in our opinion, the evidence is sufficient to support the further finding, upon which the judgment rests, to the effect that plaintiff agreed to rebuy from defendant the interest in said camera improvement at a like price to that paid by him therefor, and "that on or about the fourteenth day of January, 1915, defendant elected to sell, and on or about the twenty-ninth day of May, 1915, did sell, his said one-third interest in said improvement in

cameras, to said plaintiff and said Fairall, in accordance with last-mentioned agreement, and on or about last-mentioned date said plaintiff and said Fairall bought the same back from defendant in accordance with said agreement," which sale so made by defendant to plaintiff and Fairall was by them accepted. And, in this connection, the court, upon sufficient evidence, further found that plaintiff and Fairall paid to him the sum of \$250, which, together with the promissory note, amounted to \$750, thus leaving a balance due him of \$250, for which he was given judgment. The evidence in support of these findings is, first, a written agreement signed by Fairall and Mosley whereby they agreed to repurchase the improvement in cameras from defendant at the same price paid therefor by him; and, second, testimony of Fairall to the effect that, for himself and plaintiff and pursuant to the terms of said agreement, he purchased from defendant the interest by them sold to him in said camera invention, and paid thereon the sum of \$250. This was on May 29, 1915, from which date, his testimony tends to prove, they did not regard defendant as having any interest in the invention and dealt with other parties as to the invention, assuming they owned the whole thereof. [2] The alleged insufficiency of evidence to support these findings is based upon the sole claim that defendant did not execute a written assignment of transfer of his interest in said invention to plaintiff and Fairall; the argument being that, under section 4898 of the Revised Statutes of the United States, an interest in a patent cannot be assigned except by an instrument in writing, in support of which he also cites several authorities. Conceding this to be true, there is no evidence that the invention was patented or that it was even patentable, and, as said in *Burr v. De La Vergne*, 102 N. Y. 415, [7 N. E. 366], said section 4898 has reference solely to patents or an interest therein. It does not relate to an invention which has not been and may never be patented.

The evidence clearly tends to prove that plaintiff and Fairall, his copartner, agreed in writing to repurchase the interest sold by them to defendant in case he desired to sell; that he did express his desire to resell, and thereupon Fairall, with the knowledge of plaintiff, paid him \$250 toward the repurchase, and, according to his testimony and that of defend-

ant, both regarded the interest as belonging to plaintiff and Fairall, and in subsequent transactions dealt with it as being their own. We perceive no merit in the errors pointed out by appellant. Plaintiff and Fairall owned the invention. They agreed, at his option, to buy back the interest therein sold to him, and upon his exercising the option, paid him \$250 on account of such resale, thus leaving a balance due him of \$750, upon which the effect of the judgment is to credit them with the \$500 note. Applying section 4½ of article VI of the constitution, we cannot escape the conviction that whatever errors were committed in the trial, they did not result in a miscarriage of justice.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

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[Civ. No. 3063. Second Appellate District, Division One.—May 20, 1920.]

JOHN HALL, Respondent, v. THE PUENTE OIL COMPANY (a Corporation), et al, Appellants.

[1] NEGLIGENCE — DOCTRINE OF RESPONDEAT SUPERIOR — WHEN APPLICABLE.—The doctrine of *respondeat superior* cannot be invoked to hold the master liable for injury caused by the negligent act of a servant unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto.

[2] ID.—AUTOMOBILE ACCIDENT—SCOPE OF EMPLOYMENT—EVIDENCE.—In this action against an oil company and one of its employees to recover damages for personal injuries sustained by plaintiff

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2. Responsibility of owner when car being used by servant or another for his own business or pleasure, notes, 10 Ann. Cas. 732; 12 Ann. Cas. 972; Ann. Cas. 1914C, 1087; Ann. Cas. 1915D, 476; Ann. Cas. 1916A, 659; Ann. Cas. 1917D, 1001, 1008; Ann. Cas. 1918D, 241, 1134; 1 L. R. A. (N. S.) 235; 9 L. R. A. (N. S.) 1033; 14 L. R. A. (N. S.) 216; 21 L. R. A. (N. S.) 93; 26 L. R. A. (N. S.) 382; 33 L. R. A. (N. S.) 79; 37 L. R. A. (N. S.) 834; 47 L. R. A. (N. S.) 662; L. R. A. 1916A, 957.

Liability of owner where car is being used by borrower or hirer, note, 33 L. R. A. (N. S.) 81.

through having been struck by an automobile owned by the company and driven by such employee, the evidence showed that the accident happened after the duties of the employee to the employer had ended for the day and at a time when such employee was engaged in a mission the purpose of which was his own pleasure and which could have no possible connection with the duties which he owed to his employer.

- [3] **ID.—CONSENT OF EMPLOYER TO USE OF AUTOMOBILE — LIABILITY FOR DAMAGES.**—The fact that the employee was using the automobile of his employer for his own purposes with the employer's consent would not render the latter liable for injuries resulting from the negligence of such employee.
- [4] **ID.—EXTENT OF INJURY — CAUSE — EVIDENCE — FINDINGS.**—In this action against an oil company and one of its employees to recover damages for personal injuries sustained by plaintiff through having been struck by an automobile owned by the company and driven by such employee, the evidence was sufficient to support the findings of the trial court as to the extent of plaintiff's injury and that such injury was due to the negligence of the employee.
- [5] **ID.—SETTLEMENT AGREEMENT WITH PLAINTIFF—EVIDENCE—FINDING.**—Notwithstanding that in a criminal proceeding growing out of the negligent act of such employee the judge had told him that he would have to make some reparation for the injury sustained by plaintiff and left the matter in the hands of the probation officer, who concluded that such employee could pay a given sum each month, which sum was paid for four months, the trial court, in such action, properly found that the parties had not entered into an agreement whereby such employee agreed to pay, and plaintiff agreed to accept, said sum per month for a given number of months in full settlement of his damages.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. L. H. Valentine, Judge. Reversed in part; affirmed in part.

The facts are stated in the opinion of the court.

H. W. Kidd, Perry F. Backus, and A. J. Verheyen for Appellants.

Hugh E. Macbeth for Respondent.

**SHAW, J.**—Defendants appeal from a judgment in favor of plaintiff, awarded as damages for personal injuries.

Roberts was employed by his codefendant, whose place of business was in Los Angeles, as a traveling salesman of oil,

and, in the performance of his duty, which required him to travel in Los Angeles and adjoining counties, the Oil Company provided him with an automobile and at all times furnished the oil and gasoline necessary in the operation thereof. His daily duties covered the period from 8 o'clock A. M. to 5 o'clock P. M. With the consent of his employer, Roberts used a garage at his home in Alhambra, wherein the car was kept at night and when not in use. In addition to his use of the car in traveling back and forth from his residence to the oil company's place of business in Los Angeles he had the privilege, when not on duty to his employer, of using it for pleasure rides and purposes of his own. On the day of the accident he returned from Orange County to the yard of the Oil Company at approximately 5 o'clock P. M.; whereupon, his day's work being at an end, he, in his car, came up town, in Los Angeles, where, at Fourth and Spring Streets, he had an appointment to meet a friend at 7 o'clock, who was to accompany him to a meeting of the lodge of Elks in Alhambra. During the time between his arrival uptown, at about a quarter after 5 o'clock, and 7 o'clock, at which hour he met his friend, he wandered around town, "loafing and taking a drink here and there." At 7 o'clock he left Fourth and Spring Streets, Los Angeles, for the lodge-rooms at Alhambra, and at First Street the automobile operated by Roberts collided with plaintiff, who was thereby injured.

Upon these facts the trial court found that it was untrue, as alleged in the answer of defendant Puente Oil Company, that John J. Roberts, at the time of said accident, was operating the car on and about a mission of his own and not within the course or scope of his employment as an employee of said Oil Company, or in the performance of any act for or on behalf of said Oil Company; and also found that "the defendant John J. Roberts, while engaged within the general scope of his said employment, carelessly and negligently drove and operated the said Ford automobile, then and there the property of the said Puente Oil Company."

In our opinion, appellants' challenge to these findings, upon the ground that they are not supported by the evidence, must be sustained. [1] It is apparent the trial court, in making the findings, deemed the facts sufficient to establish a case for the application of the doctrine of *re-*

*spondeat superior*; but this principle cannot be invoked unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto. The doctrine rests upon the proposition that in doing the acts out of which the negligence arose, the servant was representing the master at the time and engaged in his business. As said in *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, [66 Am. St. Rep. 537, 50 N. E. 537]: "Beyond the scope of his employment the servant is as much a stranger to his master as any third person, . . . And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master." "The test," says the court in *Chamberlain v. California Edison Co.*, 167 Cal. 500, [140 Pac. 25], "is, whether the act was done in the prosecution of the business in which the servant was employed to assist." To the same effect, see *Gousse v. Lowe*, 41 Cal. App. 715, [183 Pac. 295]; *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, [179 Pac. 697]; *Stephenson v. Southern Pacific Co.*, 93 Cal. 558, [27 Am. St. Rep. 223, 15 L. R. A. 475, 29 Pac. 234].

[2] Clearly, Roberts was not engaged in the performance of any duty which he owed to his employer. Since the garage in which he was accustomed to keep the automobile was at his home, the taking of the car from his place of employment to such garage would have been an act within the scope of his employment. (*Riordan v. Gas Consumers' Assn.*, 4 Cal. App. 639, [88 Pac. 809].) The evidence, however, shows that he was not operating the car with a view of reaching such destination; and while the testimony shows that he might have accepted an order for the delivery of oil by his employer at any time or place, he owed no duty to his employer so to do and was not seeking such sales and did not take any orders on the day of the accident after 5 o'clock, when his duties to his employer ended for the day. Neither, in our opinion, does the fact that the employer supplied the gasoline and oil required in the operation of the car affect the question in the slightest degree. After 5 o'clock P. M. on the day of the accident his time was his own to use as he pleased, and he, likewise with the consent



of his employer, had the use of the car for his own purposes, and when the injury to plaintiff occurred he was engaged in a mission the purpose of which was his own pleasure and which could have no possible connection with the duties which he owed to his employer, any more than if he had taken the car on a holiday or Sunday for a pleasure ride for himself and family or upon a fishing trip.

[3] Respondent lays much stress upon the fact that the use of the car by Roberts for his own purposes was with the consent of the Puente Oil Company, his employer. At most, this was a mere lending of the car to him for his own use, as to which, says the court in *Brown v. Chevrolet Motor Co.*, *supra*, "it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of a borrower"; in support of which the court cites *Berry on Automobiles*, sec. 684; *Hartley v. Miller*, 165 Mich. 115, [33 L. R. A. (N. S.) 81, 130 N. W. 336]; and *Segler v. Callister*, 167 Cal. 355, [51 L. R. A. (N. S.) 772, 139 Pac. 819]. We are unable to draw any distinction between a case where the use of the car by a servant for his own purpose is without the master's consent and that where such use is permissive. Carried to its logical conclusion, the contention of respondent, which was adopted by the trial court, would render the owner of a shotgun liable for the act of one to whom he had loaned it for use on a hunting trip and due to whose negligent use thereof he had shot another. Our conclusion, therefore, is, that the findings of which appellants complain are not supported by the evidence.

[4] Appellants also predicate error upon the insufficiency of evidence to support the finding whereby the injury to plaintiff was by the court attributed to the negligence of Roberts, and exonerating plaintiff from contributory negligence. An examination of the record discloses no merit in this contention. At most, the evidence presents a conflict from which, and the circumstances shown to exist, different inferences might be deduced, and hence the determination of the trial court thereon must be deemed conclusive. Neither is there the slightest merit in the contention that the finding as to the extent of plaintiff's injury is without support.

[5] Both defendants alleged the making of an agreement between plaintiff and Roberts whereby the latter agreed to pay him fifteen dollars per month for a period of one hundred months, which plaintiff agreed to accept in full settlement of his damages, which allegation the court found to be untrue, but allowed upon the judgment rendered the sum of sixty dollars, which defendant had paid to another for plaintiff's benefit. There is nothing in the evidence upon which to base a finding other than that made. It appears from the evidence that plaintiff was not a party to any agreement touching the matter, but that in some criminal proceeding growing out of Roberts' negligent act, Judge Craig, before whom he appeared, told defendant that he would have to make some reparation for the injury sustained by plaintiff, and left the matter in the hands of the probation officer of the court, who, upon consulting Roberts and his wife and going over his income and his domestic expenses, concluded that he could pay plaintiff fifteen dollars a month, which sum, it seems, defendant paid for four months. There was no writing executed between plaintiff and Roberts evidencing such agreement, and, since the same was to cover a period of one hundred months, it was not, in the absence of such writing, enforceable against Roberts. (Sec. 1624, Civ. Code.) In addition to all of this, the evidence touching the question is too vague and uncertain upon which to base a contract of such character.

As to the defendant Puente Oil Company, the judgment is reversed; and as to the defendant John J. Roberts, it is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 3371. First Appellate District, Division Two.—May 20, 1920.]

**SAMUEL C. BOYER**, Appellant, v. **THE CITY OF LONG BEACH** (a Municipal Corporation), Respondent.

- [1] **JUDGMENTS—ORDER DISMISSING ACTION—RIGHT OF APPEAL.**—An order dismissing an action under section 581a of the Code of Civil Procedure is, when entered upon the minutes of the court, a final judgment from which an appeal may be taken.
- [2] **ID.—RELIEF FROM—REMEDIES—TIME.**—The time within which relief may be sought by appeal or motion under section 473 of the Code of Civil Procedure is limited by statute, and the time within which *certiorari* or a suit in equity may be instituted is determined by the equities of the case.
- [3] **ID.—MOTION TO VACATE—TIME.**—There is no statutory authority for a motion to set aside a judgment after the period fixed by section 473 of the Code of Civil Procedure has expired, if such judgment is not void on its face because of want of jurisdiction of the subject matter.
- [4] **ID.—ORDER DISMISSING ACTION—RECORD—PRESUMPTIONS.**—In the absence of the record of the proceedings had on the hearing of the motion to dismiss, on an appeal from an order denying a motion to set aside an order dismissing an action on the ground that the summons was not served on the defendant within three years and it had not appeared in the action, the presumption is that the motion to dismiss was made by an attorney of record and that it was supported by affidavits or other evidence.
- [5] **ID.—APPEARANCE BY DEFENDANT—DETERMINATION BY TRIAL COURT—HOW REVIEWED.**—A determination by the trial court, on a motion to dismiss an action, that a notice of substitution of attorneys for defendant, which was served on plaintiff, did not constitute an appearance by defendant—failure of service of summons being admitted—may be reviewed on appeal from an order granting the motion.

**APPEAL** from an order of the Superior Court of Los Angeles County denying a motion to vacate an order dismissing an action. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. W. Falkner for Appellant.

James E. Kelby, George L. Hoodenpyl and Christian Hoepfner for Respondent.

NOURSE, J.—This is an appeal by plaintiff from an order denying his motion to vacate an order dismissing his action against defendant made under section 581a of the Code of Civil Procedure, on the ground that the summons in the action was not served on defendant within three years next after the commencement of the action and that defendant had not appeared in said action.

The complaint was filed on May 12, 1914. Summons was not served upon defendant at any time. On October 4, 1915, the mayor of the defendant city served on counsel for plaintiff a notice that certain attorneys had been substituted by defendant for other attorneys, and this notice was filed with the papers in the case. Nothing further was done until January 4, 1918, when the attorneys so substituted for the first time appeared in the action and moved a dismissal on the grounds above stated. This motion was granted on January 16, 1918, no opposition being made thereto on behalf of plaintiff.

Thereafter and on August 5, 1918, plaintiff filed a notice of motion to vacate the order of dismissal on the grounds that (1) the motion was made by one who was not an attorney of record; (2) that the face of the record showed that a general appearance had been made by defendant, and (3) that the motion was not supported by affidavits or other evidence. This motion was denied by the trial court, and from that order the appeal is taken.

[1] An order dismissing an action under section 581a of the Code of Civil Procedure, is, when entered upon the minutes of the court, a final judgment from which an appeal may be taken. It was so held in *Marks v. Keenan*, 140 Cal. 33, [73 Pac. 751], when the provisions of this section were contained in section 581. It is true the latter section also provided that the orders of dismissal should be entered in the minutes of the court and that when so entered they should be effective for all purposes. This language was not carried into section 581a when the change was made, but the record here discloses that the order was entered in the minutes of the court and the effect of the entry can be none other than that specified in section 581. When a judgment or order is not void on its face because the subject matter is without the jurisdiction of the court rendering it, the law provides sufficient methods to reverse or correct it by appeal,

by *certiorari*, by a suit in equity, and by motion under section 473 of the Code of Civil Procedure. [2] The time within which relief may be sought by appeal or motion under section 473 is limited by statute, the time within which *certiorari* or a suit in equity may be instituted is determined by the equities of the case. [3] There is no statutory authority for a motion to set aside a judgment after the period fixed by section 473 has expired, at least if such judgment is not void on its face because of want of jurisdiction of the subject matter. It is not necessary to discuss the remedies for relief from the latter class of judgments because this is not such a case.

The motion to vacate the judgment was made more than six months after its entry. [4] The first and third grounds urged in the motion cannot be considered because, in the absence of a record of the proceedings had on the hearing of the motion to dismiss, the presumption is that they were regular. [5] The second ground urged—that the defendant had made a general appearance in the action within the three-year period—presented a mixed question of law and fact which the trial court was required to determine upon the hearing of the motion. If it correctly determined that no appearance had been made—failure of service of summons being admitted—then the order dismissing the action was proper. If the court was in error, plaintiff had a plain remedy by appeal.

In any event, the trial court certainly had jurisdiction of the subject matter and the judgment is not void on its face for that reason. It is apparent that the notice of substitution of attorneys was not treated as an appearance by either party until long after the action had been dismissed. The notice was not followed by demurrer or answer, no attempt was made to bring the cause to trial, no stipulations were made on behalf of defendant, and no concessions were given by plaintiff. That the notice was not intended to be an appearance is clear.

The trial court properly denied the motion to vacate the judgment and its order is therefore affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2776. Second Appellate District, Division One.—May 20, 1920.]

**E. G. BORGMEYER, Respondent, v. J. B. SOLOMON, Appellant.**

- [1] **CONTRACTS—ACTION TO RECOVER ARCHITECT'S FEES—EVIDENCE—FINDING.**—In this action to recover fees alleged to be due from the defendant on a contract for professional services which were rendered by the plaintiff as an architect, notwithstanding the testimony given by the defendant and others tending to prove that the contract of employment was conditioned upon plaintiff's procuring a tenant for the contemplated building, acceptable to the defendant, there was sufficient evidence to support the court's finding of the existence of a contract free from such condition.
- [2] **ID.—NATURE OF CONTRACT—INSUFFICIENT PLEADING—UNNECESSARY FINDING.**—In such an action, where affirmative matters stated in the answer are not sufficient to present the defense that there was a conditional contract, such matters being pleaded only as a part of the defense that there was no contract of employment whatever, a specific finding as to whether the contract was a conditional one is not necessary.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

**Haas & Dunnigan** for Appellant.

**Philip Cohen** and **Walter F. McEntire** for Respondent.

**CONREY, P. J.**—This action was brought by the plaintiff to recover fees alleged to be due to him from the defendant on a contract for professional services which were rendered by the plaintiff as an architect. [1] It was found by the court that the defendant employed the plaintiff as such architect to prepare plans and specifications for the erection of a hotel building at a described location in the city of Los Angeles, and agreed to pay therefor the sum of nine hundred dollars, which sum was to cover the cost of superintending the erection and construction of the building; also that the plaintiff prepared plans and specifications, as required by the defendant, and has at all times been ready,

willing, and able to perform the services of superintending the erection and construction of the said building, but the defendant has refused and still refuses to erect and construct said hotel building in accordance with the plans and specifications prepared by the plaintiff, and has refused to pay, etc. Judgment was rendered in favor of the plaintiff, and the defendant appeals therefrom.

Appellant contends that the findings above mentioned are not sustained by the evidence. In support of his contention that the evidence is not sufficient to establish the contract of employment on the terms stated in the complaint and found by the court, appellant insists that the evidence without conflict shows that the contract of employment was conditioned upon plaintiff procuring a tenant for the contemplated building, acceptable to the defendant. While an examination of the record shows that there was testimony given by the defendant and others tending to prove that the contract of employment was conditional, as above stated, yet such evidence was not without conflict. On the contrary, there is evidence strongly tending to show that the contract was free from such condition. This evidence showed, among other things, that the plaintiff was introduced to the defendant by one Seigel, a contractor, and that the plaintiff told the defendant that if defendant was willing to take a little less rent than he was proposing to demand, plaintiff was sure he could get him a tenant; that very promptly thereafter the plaintiff, through an agent, obtained the name of a prospective tenant and informed defendant that he had a tenant for the hotel; that this tenant, one Mrs. Verhaar, is the same person who afterward became the tenant of defendant's building after it had been constructed by the defendant on plans prepared by an architect other than the plaintiff; that shortly after plaintiff's first conversation with defendant an interview took place between plaintiff and defendant and Mrs. Verhaar, at which time Mrs. Verhaar stated that she would take the house if the plans suited her, but would not sign the agreement until the plans were completed; that the plaintiff prepared the plans and completed them about four weeks after the time of said interview at which Mrs. Verhaar was present; that during these four weeks the defendant and the contractor were present at the plaintiff's office many times, examining the plans and mak-

ing suggestions concerning the same; that before the plans were prepared the defendant directed the plaintiff to go ahead with their preparation and promised to pay fees amounting to three per cent of the cost of the proposed building, such cost being estimated at thirty thousand dollars. The testimony of the witnesses indicates that in their preliminary negotiations the defendant was influenced by the prospect that the plaintiff might aid him in procuring a tenant for the proposed building and that such probable tenant had been found. But this testimony was not compelling upon the court to find that the procuring of such tenant entered into and became a part of the actual employment of the architect to prepare the plans and specifications. After those plans and specifications had been completed, the defendant refused to proceed according to those plans and specifications, or to avail himself further of the services of the plaintiff. No reason or excuse for such refusal appears in the record; although it does appear that the defendant, with the assistance of other architects, erected a hotel building at the proposed location and that Mrs. Verhaar became the tenant thereof.

Being satisfied with the court's finding of an unconditional contract, we need not discuss the second point of appellant, which is that, assuming that plaintiff was bound to procure a tenant, he did not comply with that condition.

[2] Finally, appellant contends that the court "failed to find on the material issue raised by the answer that the contract was a conditional one," and that the judgment should be reversed for that reason. The affirmative matters stated in the answer and to which this argument is directed are, in fact, not sufficient to present the defense that there was a conditional contract. On the contrary, those matters were pleaded only as a part of the defense that there was no contract of employment whatever. The affirmative matters in question stated that the plaintiff made a proposition to the defendant concerning a lease to be made to a prospective tenant to be produced by the plaintiff and proposed that plaintiff act as architect in making the plans and superintending the construction of such building; and then alleges that no agreement was made with the plaintiff by the defendant for the drafting of plans or specifications of said building, or the supervision of the construction of the same,



and that such plans as the plaintiff did prepare were prepared wholly and solely at his own instance, and not on request of defendant or pursuant to any employment by the defendant. It thus appears that the answer did not set up a conditional contract or make the defense that the plaintiff had not complied with the conditions required of him thereby. This being so, the affirmative matters stated were merely of an evidentiary nature in connection with defendant's denial that he made any contract with the plaintiff. As to matters so pleaded in the answer specific findings were not necessary.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 3332. Second Appellate District, Division Two.—May 21, 1920.]

ALEXANDER C. PYPER, Petitioner, v. LACY D. JENNINGS, Justice of the Peace, etc., Respondent.

- [1] EVIDENCE—COMPELLING PRODUCTION OF PRIVATE BOOKS OR PAPERS—CONDITIONS PRECEDENT TO ORDER.—As a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination, it must be made to appear, by clear and unequivocal proof, that the book or document contains evidence relevant and material to the issues before the court and that the precise book, paper, or document containing such evidence has been so designated or described that it may be identified.
- [2] LIBEL—TRUTH AS DEFENSE—INNUENDO.—Where the defendant in a libel case sets up the truth as a defense, he must justify the

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2. Truth as a defense to a civil action for libel or slander, notes, 17 Ann. Cas. 761; Ann. Cas. 1918C, 335, 1088; 21 L. E. A. 502; 31 L. E. A. (N. S.) 132; 50 L. E. A. (N. S.) 1040.

words in the sense in which the *innuendo* explains them, assuming, of course, that the words are capable of the meaning imputed to them by the *innuendo*.

- [3] **ID.—PLEA OF JUSTIFICATION—SCOPE.**—The general rule is that the plea of justification in a libel case must be as broad as the charge, and, in point of law, must be identical with it.
- [4] **ID.—REPUTATION—HOW PROVED.**—Reputation, or, as it is sometimes called, character, is a fact to be proved by the testimony of witnesses who know it, not by the proof of specific instances of misconduct which may or may not have affected it injuriously.
- [5] **ID.—STATEMENTS CONCERNING RE-ELECTION OF MAYOR—CONFIDENCE OF ELECTORS—UNJUSTIFIED INNUENDO.**—A publication concerning the mayor of a city, "They were surprised you ever put him in office, dumbfounded at his re-election, and amazed beyond measure that you continue to put up with him," the word "they" referring to certain northern neighbors and the word "him" to the mayor, does not justify an *innuendo* to the effect that he was not worthy of the confidence of the electors.
- [6] **ID.—CHARGE OF BAD REPUTATION IN GIVEN LOCALITY—HOW JUSTIFIED.**—A publication concerning the mayor of the city of San Diego that he might go to Tia Juana (Mexico) and get one hundred men to stand by him, the intention of the article being to convey the implication that his reputation among the habitués of the latter place is such that they believe he is not a citizen of good morals or integrity, or of good character, and is not acting in good faith in his declared purpose to suppress crime, and that because they so believed, they will be willing to stand behind him and be guided by him, can be justified only by proof that such is his reputation there and not by proof of specific acts of misconduct.
- [7] **ID.—ABSENCE OF CHARGE OF SPECIFIC ACT OF DISHONESTY—VAGUE REFERENCE TO OPINION OF OTHERS—PROOF IN JUSTIFICATION.**—Where the libelous article, without imputing any specific act of dishonesty, seeks to blacken the good name of the object of the defamatory words by vague reference to some ill-defined opprobrious opinion others have of him, without conveying to the readers any sharply edged delineation of that opinion, the defendant can only justify by direct proof of bad, or, at least, impaired, reputation in the community or among the class of persons referred to in the defamatory article.
- [8] **ID.—STATEMENT THAT PERSON WORTHY OF CONFIDENCE—UNJUSTIFIED INNUENDO THAT OTHERS NOT WORTHY.**—A published statement that "he [the chief of police] surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I find expressed on all sides," does not justify an *innuendo* that the mayor of the city is not worthy of that confidence.

- [9] **ID.—INNUENDO EXPLAINING PUBLICATION — RIGHT TO JUSTIFY IN THAT SENSE.**—The defendant in a libel action may justify the substance of the publication in the sense in which the *innuendo* explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended, or changed by the *innuendo*, and if it is, the *innuendo*, to the extent that it is not borne out by the defamatory words, will be rejected as surplusage.
- [10] **CONTEMPT — REFUSAL TO PRODUCE BOOK OR PAPER — ORDER PUNISHING—NECESSARY RECITALS.**—An order punishing a witness for contempt for refusing, in open court, to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order, and for this purpose must recite facts showing that the document contains evidence pertinent and material to the issue to be tried.
- [11] **LIBEL—CHARGE OF GAMBLING—PROOF OF MISUSE OF TRUST FUNDS IRRELEVANT.**—Where the defamatory words charge one with the gambling habit, the truth of the charge cannot be proved by evidence that the libeled person has misused trust funds.

**APPLICATION** for a Writ of Prohibition to restrain a justice of the peace from enforcing a judgment of contempt. Writ issued.

The facts are stated in the opinion of the court.

Morganstern & Dorn for Petitioner.

Curtis Hillyer and Wright & McKee for Respondent.

**FINLAYSON, P. J.**—This is an application for a writ of prohibition to restrain respondent, justice of the peace for the township of San Diego, from enforcing a judgment of contempt rendered by him in an action for criminal libel then pending in his court and entitled "The People of the State of California, Plaintiff, *v. The San Diego Sun Publishing Company, a Corporation, and R. A. Lacy, Defendants.*"

The criminal action, in the course of which the contempt proceedings arose, is based upon a defamatory article alleged to have been published of and concerning Louis J. Wilde, mayor of the city of San Diego. The defendants in the criminal action undertook to prove the truth of the libelous charge. For that purpose they sought to cause to be produced in court certain books in the possession of the petitioner here. These books, so it is claimed, show the pay-

ments into and disbursements from a certain trust fund, under the control of Wilde, known as the Community Oil Well Fund. As a basis for their claim that the books contain evidence relevant and material to the issues presented by the complaint in the action for criminal libel, the defendants in that action contended, as does the respondent here, that the entries in the books show that Mayor Wilde was not a man of integrity, in this, that they disclose that he had applied some of the moneys in the Community Oil Well Fund to uses foreign to the purposes for which that trust fund had been created. The fund is one in which private persons only are interested.

While a witness in the justice's court, petitioner was ordered by respondent to produce the books. Upon his refusal to comply with that order petitioner was adjudged guilty of contempt of court and sentenced to imprisonment in the city jail for one day.

Respondent has demurred to the petition, and, at the same time, has filed a written answer. It was stipulated at the hearing that, in so far as the averments of the answer are allegations of fact and not mere conclusions of law, its averments are true. We, therefore, deem it not only the more expeditious course, but proper, to dispose of the case on its merits, and for that purpose, to consider the case in its entirety—the facts averred in the answer as well as those alleged in the petition for the writ.

[1] It is the established rule that, as a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination, it must be made to appear, by clear and unequivocal proof, (1) that the book or document contains evidence relevant and material to the issues before the court; and (2) that the precise book, paper, or document, containing such evidence has been so designated or described that it may be identified. (*Ex parte Clarke*, 126 Cal. 235, [77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546]; *Kullman etc. Co. v. Superior Court*, 15 Cal. App. 276, [114 Pac. 589]; *Funkenstein v. Superior Court*, 23 Cal. App. 663, [139 Pac. 101].) For the purpose of this decision we shall assume that, by evidence properly adduced in the justice's court during the trial of the criminal action, the books themselves, and so much of their contents as the defendants in that action sought to introduce

in furtherance of their declared purpose to show that Wilde had improperly used certain moneys of the Community Oil Well Fund, were identified with all the particularity required for compliance with the constitutional guaranty against unreasonable searches and seizures. Under the rule just adverted to, however, there was this further requisite: It was essential, as a condition precedent to the right of the justice's court to require petitioner to deliver the books up for examination, that it be made to appear, by clear and unequivocal proof, that the books contain evidence relevant and material to the issues in the criminal action. In our opinion the entries in the books, assuming that they do show that, at times, Mayor Wilde misused or misapplied certain of the moneys of the trust fund, are not material to any issue in the criminal action. Conceding to the defendants in that action all that they there claimed respecting the nature of the book entries, the entries, nevertheless, would not tend to prove the truth of any of the defamatory matters in the alleged libelous article as charged in the criminal complaint.

The alleged libelous article, published in "The San Diego Sun," a newspaper printed and published in that city, is as follows:

"Editor Sun: Having come from a northern city where one of your city officials is only too well known, it was with considerable amusement that I read an article by him in a morning paper some few days ago. Hearing the public on every hand referring to same as another 'Brain Storm,' proved San Diegans are 'next,'—but truly it is sad your northern neighbors are not aware of this. They were surprised you ever put him in office, dumfounded at his re-election and amazed beyond measure that you continue to put up with him. San Diego must be virtuous if patience is anything to go by; but there comes a time when patience ceases to be a virtue. According to his own statements in the Sunday paper the 100 citizens didn't show up. Why doesn't he got to Tia Juana. He might get 100 there to stand by him, even though it is said there is honor among thieves. The ungentlemanly remarks and foul language he allows to come in print above his name must disgust even the worst. Although hearing the best reports of the San Diego police department, and personally knowing of some

very efficient work done by same, I can speak only in terms of the department. If, however, your police chief is anything like your mayor described him, he must be Wilde's twin brother, for he surely drew his own picture to perfection. What I can't understand is that the alleged ungovernable temper of your chief hasn't let loose and made a large and rather dirty grease spot in your city hall. He surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I find expressed on all sides. I do feel, however, your mayor is to be pitied rather than censured, but it is a shame that your lovely city must be the goat and suffer such humiliations. You are laughed at, but what can you expect with your jazz cat gambles and brain storms! You have an exceptional council; get rid of your Wild mayor, and San Diego will take her place in the top ranks.

"Yours from the north,

"R. A. LACY, Gen. Del."

While this defamatory article may have a tendency to expose Mayor Wilde to public ridicule, it will be noticed that nowhere does it make any direct charge of dishonesty—certainly none of the character sought to be proved by the books that petitioner refused to produce; though, of course, it is possible that some passages of the letter published in "The Sun" may have a covert meaning, which, read in the light of such extrinsic circumstances as formerly it was the office of the inducement to narrate, may be susceptible of a construction imputing to the mayor dishonesty in financial transactions. But unless, by way of *innuendo*, there is some averment in the criminal complaint that properly places such a construction upon the words of the defamatory article, the defendants in the criminal action cannot adduce evidence of any specific misappropriation of trust funds.

[2] The rule is that where the defendant in a libel case sets up the truth as a defense, he must justify the words in the sense in which the *innuendo* explains them, assuming, of course, that the words are capable of the meaning imputed to them by the *innuendo*. (*Snyder v. Tribune Co.*, 161 Iowa, 671, [143 N. W. 519]; note to *Hutchins v. Page*, 31 L. R. A. (N. S.) 140; 25 Cyc. 460; Newell on Slander, and Libel, p. 793.) In *Snyder v. Tribune Co.*, *supra*, the

court said: "A proper plea of justification either expressly or impliedly admits the truth of the *innuendo* [for the purpose of the justification]; and, where the defendant sets up the truth, he must justify the words in the sense in which the *innuendo* explains them, unless the words used in the *innuendo* enlarge the natural and ordinary sense of the language, or otherwise place a false construction thereon."

The complaint in the action for criminal libel, after setting forth the libelous article *in haec verba*, proceeds, by the averment of what the pleader deemed to be appropriate *innuendoes*, to explain certain passages by alleging the meaning that the defendants intended to convey to readers thereof. It is claimed by respondent that these *innuendoes* give to the libelous article such a meaning that the defendants in that action, for the purpose of proving the truth of the libelous charges, may rightfully show any specific act of dishonesty on the part of Mayor Wilde, and that for that purpose, the books showing Wilde's disbursements from the Community Oil Well Fund were admissible in evidence.

Taking up now the particular *innuendoes* relied upon by respondent to justify his order adjudging petitioner guilty of contempt: By way of *innuendo*, the complaint in the criminal action alleges that "by and through the said letter above set forth the said defendants then and there intended to convey to any and all persons who read the same, by the use of the words 'where one of your city officials is only too well known,' that he, the said Louis J. Wilde, was, in the said northern city, unfavorably known, and was not entitled to the respect of those with whom he was acquainted in said northern city *because he, the said Louis J. Wilde, lacked integrity.*" We have italicized the words of this *innuendo* upon which respondent particularly relies.

The words used in the alleged defamatory article "a northern city where one of your city officials is only too well known," at most can import no more than that, among the inhabitants, or some of them, of a city north of San Diego, Mayor Wilde bears an unsavory reputation. An odious reputation in some unidentified northern city is, therefore, the gist or sting of the libelous charge. The defamatory charge implies no particular act committed by Wilde. Nor does it impute a reputation for the commission of any particularly improper, immoral, or criminal act; but

only that, in the estimate of the public in some unnamed city, his reputation is bad—that his good name, credit, or honor, *as derived from public opinion* in that northern city, is to some extent impaired. [3] The general rule is that the plea of justification must be as broad as the charge, and, in point of law, must be identical with it. Here, in order to justify, by proof of the truth of the words “a northern city where one of your city officials is only too well known,” it would be necessary to show that, in the northern city referred to by the author of the article, or which the readers understood to be the city referred to, Mayor Wilde’s general reputation is not good. [4] Reputation, or, as it is sometimes called, character, is a fact to be proved by the testimony of witnesses who know it, not by the proof of specific instances of misconduct which may or may not have affected it injuriously. Every man is bound, and is supposed to be always prepared, to answer and repel imputations upon his general reputation whenever that reputation is by the rules of law assailable in court, but not to answer specific charges of misconduct where no specific charge is imputed by the defamatory article of which he complains. Particular instances of misconduct on the part of a plaintiff in a civil action for libel, or of the complaining witness in an action for criminal libel, have no necessary connection with his reputation. It may not be known or believed that such specific acts of misconduct have in fact occurred, and so their occurrence may have produced no effect upon the public mind, and, consequently, have nothing to do with the good or bad reputation of the person libeled. Here the defamatory article merely implies that San Diego’s mayor has acquired, in some unnamed community a bad reputation, or, at least, that his general reputation in such community is, to some extent, impaired. But that is a matter that rests upon public opinion, and may exist without any just foundation. It is the existence of the public opinion, and not the foundation on which that opinion rests, that is the fact put in issue. There is, therefore, no necessary connection between any specific act of misappropriation of trust funds, such as may be disclosed by the entries in these private books of account, and a loss of Wilde’s good reputation in some unidentified city where, it is charged, he “is only too well known.” The case of *Swift v. Dickerman*, 31 Conn.



285, 293, is somewhat instructive in this connection. It was held in that case that where the libelous article reflects upon the general professional reputation of a physician, evidence of specific instances of mistakes in his treatment of his patients is not admissible. The general line of reasoning pursued by the Connecticut court in that case is applicable here. (See, also, *Cooper v. Greeley*, 1 Denio (N. Y.), 347, 365.) For these reasons we hold that the order directing petitioner to produce the books of the Community Oil Well Fund was not warranted by anything alleged in the *innuendo* that seeks to give point to the charge that Mayor Wilde "is only too well known" in the northern city referred to by the author of the defamatory article.

[5] It next is sought to justify the contempt order by this averment of the criminal complaint, alleged by way of *innuendo*: "By the use of the words, 'They were surprised you ever put him in office, dumfounded at his re-election, and amazed beyond measure that you continue to put up with him,' it was intended to convey to the persons who read said letter that said northern neighbors could not understand how the people of San Diego would re-elect said Louis J. Wilde to the office of mayor of the said city of San Diego, and that he, the said Louis J. Wilde, was not entitled to be re-elected, *nor was he worthy of the confidence of the electors of said city.*" It is the last clause of this averment, italicized by us, upon which respondent relies to justify his order adjudging petitioner guilty of contempt. But this *innuendo*, if respondent's interpretation of it be accepted as that intended by the pleader, is much too broad. As construed by respondent to justify his order to produce the books, this part of the *innuendo* gives to the language of the defamatory article a forced and unnatural meaning. The language of the alleged libelous article is: "They [your northern neighbors] were surprised you ever put him [Mayor Wilde] in office, dumfounded at his re-election and amazed beyond measure that you continue to put up with him." These words, read in the light of their context, can only mean that the "northern neighbors," whoever they may be, by reason of Mayor Wilde's reputation, *as they know it*, were surprised, dumfounded, and amazed. It may well be that, in the opinion of these northern neighbors, and solely because of the reputation that he bears

among them, Wilde was not entitled to be re-elected and is not now worthy of the confidence of the electors of San Diego. But this is not tantamount to a charge that Mayor Wilde, in fact, was not entitled to be re-elected, or that, in fact, he is not worthy of the confidence of his San Diego constituents. The gist or sting of the charge is that Mayor Wilde bears a poor reputation among the members of some northern community—that his reputation among them is so poor that they were surprised that the electors of San Diego put him in office, etc. So here again the *fact* put in issue is the state of the public mind in some unnamed northern city. The truth of the charge can only be shown by direct evidence of Mayor Wilde's general reputation for trustworthiness in the particular northern city that the author of the defamatory article had in mind when he wrote the letter to "The San Diego Sun." Such evidence can be given only by those who can testify that they know Wilde's reputation in the northern city referred to by the author of the article. To give to that part of the *innuendo* italicized by us—the part upon which respondent relies to justify his order—an interpretation consonant with the obvious meaning of the defamatory words sought to be explained thereby, it must be construed as meaning that San Diego's northern neighbors, because of what they believe Wilde to be, could not understand how or why he was entitled to be re-elected, or how or why he should be worthy the confidence of the electors of San Diego.

[6] It is alleged in the complaint in the criminal action, by way of *innuendo*, that, by the words "according to his own statements in the Sunday paper the 100 citizens didn't show up. Why doesn't he go to Tia Juana? He might get 100 there to stand by him, even though it is said there is honor among thieves," the defendants in the criminal action intended to convey to readers of the article that Mayor Wilde had been unable to obtain one hundred citizens of San Diego to assist him in suppressing crime in that city, and that, therefore, he should go to Tia Juana, Mexico, where he would find one hundred men who might be willing to assist him in an apparent effort to suppress crime in San Diego, but that they would not make any *bona fide* effort to suppress crime, because they are men of dissolute character and would be in sympathy with Mayor Wilde and

would be guided by him in anything he undertook, "because of the fact that he, the said Louis J. Wilde, was not a citizen of good morals or integrity, or good character, and was not acting in good faith in his declared purpose to suppress crime in San Diego." The sting of the libelous words, as explained by this *innuendo*, is that Mayor Wilde's reputation among the habitués of Tia Juana is such that they, or one hundred of them, would be willing to stand by him in a simulated effort to suppress crime, and would be guided by him in anything he undertook. It is what the one hundred denizens of Tia Juana think of Wilde, and not what he actually is, that will determine their attitude toward him and his official conduct. He may or may not be honest in fact. But whether he be in fact a man of integrity or the reverse, the one hundred dissolute characters of Tia Juana will be guided by him because, and only because, of what they believe him to be.

The publishers of the defamatory article, in almost every instance throughout their attack upon Wilde, have screened their assault behind either a direct or a veiled reference to Wilde's reputation among persons of a certain community or among those of a certain class. First, there is the reference to Wilde's reputation among the people of a northern city—San Diego's northern neighbors. Now, there is a reference to the dissolute characters of Tia Juana, and their attitude toward Wilde—based, necessarily, upon what they think of him. By the defamatory words which we at present are considering, the publishers of the article screen their attack with the veiled implication that Wilde's reputation among the habitués of Tia Juana is such that they believe that he is "not a citizen of good morals or integrity, or of good character, and is not acting in good faith in his declared purpose to suppress crime," and that because they so believe, they will be willing to stand behind him and be guided by him. This, manifestly, is the meaning intended. For obviously the one hundred frequenters of Tia Juana will be guided by what they believe Wilde to be, not what he may in fact be. Therefore, it is his reputation among the men of Tia Juana that Wilde must come prepared to defend, not his innocence of any and every specific charge of dishonesty that defendant may unexpectedly spring at the trial. [7] We are not to be understood as holding that where

some specific act of wrongdoing is the sting of the charge, the defendant in a libel action cannot justify by proof of the truth of such specific act of misconduct, even though such wrongful act be covertly conveyed to the readers of the article as a lurking implication, concealed in some reference to the reputation of the person libeled. What we do hold is that where, as here, the libelous article, without imputing any specific act of dishonesty, seeks to blacken the good name of the object of the defamatory words by vague references to some ill-defined opprobrious opinion others have of him, without conveying to the readers any sharply edged delineation of that opinion, the defendant can only justify by direct proof of bad, or, at least, impaired, reputation in the community or among the class of persons referred to in the defamatory article.

[8] It is alleged in the criminal complaint that, by the use of the words "he [the chief of police] surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I find expressed on all sides," it was intended to convey to readers of the article that the chief of police of San Diego had proper control of his temper and was worthy the confidence of the people of San Diego, but that Wilde "was not worthy of such confidence." This averment also is relied upon by respondent to justify his order directing petitioner to produce the books. But the *innuendo*, in so far as it undertakes to explain the libelous words by ascribing to them the meaning that Wilde is not worthy the confidence of the people of San Diego, is not supported by the libelous language that it seeks to explain. The *innuendo* improperly enlarges the plain and unambiguous meaning of the words of the article. The words of the defamatory article are: "He [the chief of police] . . . must be worthy the confidence in him which I find expressed on all sides." This language cannot be made to carry the covert charge that Mayor Wilde does not deserve the confidence of the people of San Diego. An *innuendo* seeking to give to the words of the published article any such meaning enlarges the natural and ordinary sense of the words. Without doubt, the ascription to one person of some particular virtue may be made in such a manner as to imply that another, at whom the blow

is indirectly aimed, is lacking in that virtue. But here the libelous article affords no basis for the claim that any such contrasting of the two men was intended. It is made sufficiently apparent from the context that praise of San Diego's chief of police cannot be regarded as an indirect reflection upon the mayor. At any rate, the praise of the former cannot be regarded as carrying the imputation that the latter has forfeited his title to confidence by reason of any act of dishonesty. [9] The defendant in a libel action may justify the substance of the publication in the sense in which the *innuendo* explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended or changed by the *innuendo*, and if it is, the *innuendo*, to the extent that it is not borne out by the defamatory words, will be rejected as surplusage. We think that that part of the *innuendo* that ascribes to the words of the libelous article the meaning that Wilde is not worthy the confidence of the people of San Diego places a false and unwarranted construction upon the words of the published article, and should be rejected as surplusage.

Finally, it is claimed by respondent that the entries in the books of the Community Oil Well Fund, showing, so it is claimed, the misuse of trust funds by Wilde, are relevant to the issues presented by these averments of the complaint in the criminal action: "By the use of the following words: 'I do feel, however, your mayor is to be pitied rather than censured, but it is a shame that your lovely city must be the goat and suffer such humiliations. You are laughed at, but what can you expect from your jazz eat gambles and brain storms!' it was intended to have the readers of said letter understand that he, the said Louis J. Wilde, was mentally irresponsible, and that by reason thereof he was to be pitied rather than censured, and that it was a shame that San Diego was made to suffer because of the fact that said Louis J. Wilde was the mayor of said city, and that he, the said Louis J. Wilde, was causing persons residing outside the city of San Diego, and therein, to laugh at San Diego, because he, the said Louis J. Wilde, was engaged in gambling, and that he was suffering from mental unsoundness." Here the stings of the publication are that Wilde is mentally unbalanced and that he has been engaged in gambling. We do not know whether the books of the Community Oil

Well Fund show that Mayor Wilde has been engaged in gambling. But if they do, that fact can afford no foundation for the order adjudging petitioner guilty of contempt. [10] The rule is that an order punishing a witness for contempt for refusing, in open court, to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order. For this purpose the order must recite facts showing that the document contains evidence pertinent and material to the issue to be tried. (*Overend v. Superior Court*, 131 Cal. 280, [63 Pac. 372].) [11] Here the order adjudging petitioner guilty of contempt, a copy of which is annexed to respondent's answer, contains no recital that the books of the Community Oil Well Fund show that Wilde has ever been engaged in gambling. The most that the order attempts to show is that the books disclose that Wilde has misused the moneys of a fund intrusted to him. A charge that Wilde "was engaged in gambling" is not a charge of dishonesty of the character involved in the misuse of trust funds. Without enlarging upon the iniquity of gambling, suffice it to say that, however much moral obliquity may inhere in that vice, its unethical features are not of the character that distinguishes such downright acts of dishonesty as the misappropriation of trust funds. Where a charge is made in general terms imputing to another a habit or custom of wrongdoing, it has been held that particular acts of misconduct of *the same character as the offense charged* are admissible in evidence as tending to prove the truth of the charge; but never has it been held that wrongful acts of an entirely dissimilar character may be given in evidence in proof of the charge. (17 R. C. L. 413.) It follows, therefore, that where the defamatory words charge one with the gambling habit, the truth of the charge cannot be proved by evidence that the libeled person has misused trust funds.

For the foregoing reasons we are of the opinion that Wilde's wrongful appropriation of the moneys of the Community Oil Well Fund, if, in fact, he did misappropriate them, was not relevant to any issue presented by the complaint in the criminal action, and that, therefore, the books that this petitioner was directed to produce contain no evidence pertinent or material to the issues before the justice's court.

Our conclusion is that respondent was without jurisdiction to make the order adjudging petitioner guilty of contempt of court, and that the order is, therefore, void.

Let the peremptory writ issue as prayed.

Thomas, J., and Weller, J., concurred.

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[Civ. No. 3325. Second Appellate District, Division Two.—May 21, 1920.]

**FEDERAL CONSTRUCTION CO. (a Corporation), Petitioner, v. WILLIAM RYAN, as Superintendent of Streets, etc., Respondent.**

- [1] **STREET LAW—IMPROVEMENT ACT OF 1911—ISSUANCE OF BONDS—SUFFICIENCY OF RECITAL IN RESOLUTION OF INTENTION.**—A resolution of intention to order certain street work, under the Improvement Act of 1911 and Improvement Bond Act of 1915, is not vitiated by a recital therein "that a serial bond to represent unpaid assessment" will be issued, where such resolution states further that the bonds will be issued "in the manner provided by the Improvement Bond Act of 1915," a general reference in the proceedings prior to the warrant adopting the provisions of that act being sufficient to confer jurisdiction.
- [2] **ID.—AMENDED RESOLUTION OF AWARD—RIGHT TO ADOPT—CORRECTION OF ERROR.**—In the improvement of streets under the provisions of the Improvement Act of 1911 and Improvement Bond Act of 1915, the city council has jurisdiction to pass an amended resolution of award in order to correct an error in its original resolution, provided at the time of the adoption of such amended resolution no rights of third persons have vested.
- [3] **ID.—AMOUNT OF BID—RECITALS IN AWARD AND NOTICE—SUBSTANTIAL COMPLIANCE WITH LAW.**—Where the resolution of award recites that the contract for doing the work was awarded to a given company "at the prices named in its bid," and the notice of award as posted and published declares that the board of trustees "awarded the contract for said work to the lowest responsible bidder . . . at the prices named for said work in said proposal or bid on file," this constitutes a substantial compliance with the provisions of the Improvement Act of 1911.

**PROCEEDING** in Mandamus to compel a superintendent of streets to execute a contract for the improvement of certain streets. Peremptory writ issued.

The facts are stated in the opinion of the court.

**Frank H. Powers and Heller, Powers & Ehrman for Petitioner.**

**Paul S. Honberger for Respondent.**

**WELLER, J.**—Mandate to compel the respondent, as street superintendent, to execute a contract for the improvement of certain streets in the city of Paso Robles.

The petition recites that on January 19, 1920, the board of trustees of the city of Paso Robles passed a resolution of intention to order certain work done, under the provisions of the "Improvement Act of 1911," [Stats. 1911, p. 730], and "Improvement Bond Act of 1915," [Stats. 1915, p. 1464], and amendments thereto, and caused notice of the passage of the resolution to be published and posted according to law. No protests having been received, on the fourth day of February, 1920, the board adopted a resolution ordering the work to be done, and caused a notice inviting proposals for doing the work to be given, in accordance with the provisions of the acts above mentioned. Pursuant to that notice, petitioner presented its bid, and was found to be the lowest responsible bidder, whereupon the board, on February 24, 1920, passed a resolution awarding to petitioner the contract for doing the work.

By its resolution of intention the board declared that serial bonds should be issued to represent the expenses of the improvement, specifying the rate of interest the bonds should bear, and also caused a similar description to be inserted in the resolution ordering the work to be done, as well as in all notices posted and published in connection with the prior proceedings; but no reference to bonds was contained in the resolution of award. On March 9, 1920, the city clerk posted a notice of award, which referred to the issuance of bonds substantially as did the resolution of intention. The owners of three-fourths of the frontage liable to be assessed for the improvement did not elect to take the work, and no person interested in the lands filed with the clerk a notice specifying any irregularity in the previous proceedings.

On April 5, 1920, the board adopted an amended resolution of award, including notice of the proposed issuance of bonds, and ordered the notice of award to be reposted and



republished. In accordance with this order, the clerk posted notice of award on the seventh day of April, 1920, and caused it to be published.

On April 17, 1920, the petitioner presented to the street superintendent a contract for his signature, and tendered bonds duly approved, together with the necessary costs, all in accordance with the provisions of the act. Respondent declined to execute the contract, basing his refusal on the ground that the proceedings theretofore taken were void, and sets forth in his answer filed herein the reasons for his claim, which we will consider in their order.

[1] (1) That portion of the resolution of intention which declares that bonds shall issue contains the recital: "Notice is hereby given that a *serial bond* to represent unpaid *assessment* and bear interest at the rate of seven per cent per annum will be issued hereunder in the manner provided by the Improvement Bond Act of 1915." Respondent contends that reference to bonds in the singular vitiates the resolution, arguing that the property owner might be misled into the belief that one bond was to be issued to represent the cost of the entire improvement, and thus be unable to determine or segregate his individual liability. In answer to this it is sufficient to say that the resolution states that the bonds will be issued in the manner provided by the act, and thereby incorporates the provisions of the statute into the resolution.

Section 61 of the Improvement Act of 1911, as amended in 1915, reads as follows: "When said city council shall determine that serial bonds shall be issued to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention to do said work, and shall specify the rate of interest which they shall bear. The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by this act to be either posted or published; and also a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, shall be included in the warrant provided for in section 22 of this act." The first specific mention of the amount of the bonds is to be included in the war-

rant, hence a general reference in prior proceedings adopting the provisions of the act is sufficient to confer jurisdiction. In proceedings under the Vrooman Act, which contains provisions similar in effect to the Improvement Act of 1911, it has been held that the city council may fix the term the bonds are to run at any time prior to the issuance of the warrant. (*Cohn v. Federal Construction Co.*, 171 Cal. 547, [153 Pac. 916].)

[2] (2) It is claimed that the council had no jurisdiction to pass the amended resolution of award on the 5th of April, 1920, on the theory that it had exhausted its powers by the adoption of the original resolution of February 24, 1920. No authority is cited in support of this proposition, and we have found none. On the contrary, in our opinion, the act itself contemplates such a procedure as that taken by the board. Section 16 provides: "At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvement, are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, provided, the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act." While there is no express authorization in the act for the correction of errors in the proceedings, the natural inference must necessarily be that it was intended that the council should have power to remedy defects occurring after it had acquired jurisdiction to order the work done, when its attention was directed to them. Any other conclusion would render the section nugatory; and we deem it our duty to construe the statute so as to carry into effect the intention of the legislature as therein expressed.

At the time of the adoption of the amended resolution of award no rights of third persons had vested. It is as much to the interest of the property owner as of the contractor that the proper reference to the bonds be made in the proceedings wherever required, in order that he may legally avail himself of the election to pay his assessment in cash or to permit bonds to issue against his property. The effect of reposting the notice of award would be to extend the time within which the property owners might enter into the contract, and no possible injury could result therefrom.

[3] (3) It is urged that the resolution and notice of award are insufficient in that neither the resolution nor the notice contains a statement of the amount of the bid or the contract price. The resolution of award recited that the contract for doing the work was awarded to the Federal Construction Company "at the prices named in its bid." The notice of award as posted and published declared that the board of trustees "awarded the contract for said work to the lowest regular responsible bidder, to wit, Federal Construction Company, at the prices named for said work in said proposal or bid on file." This, we think, is a substantial compliance with the law. Section 10 of the act provides that the city council "may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid." This was done, and nothing more was required. Any person interested could readily ascertain the contents of the bid by an inspection of the document on file in the clerk's office to which the notice of award refers.

No other points are made by respondent, and we believe the objections we have discussed are without merit.

Let the peremptory writ issue.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 3367. First Appellate District, Division Two.—May 21, 1920.]

**JOHN W. KOEHL et al., Respondents, v. ADOLPH D. CARPENTER et al., Appellants.**

- [1] **NEGLIGENCE—ACTION FOR DAMAGES FOR DEATH—ABSENCE OF CONTRIBUTORY NEGLIGENCE—EVIDENCE—FINDING—APPEAL.**—In an action for damages for death caused by the deceased having been struck by an automobile, a finding by the trial court that the deceased was not negligent, if supported by sufficient evidence, will not be disturbed on appeal.
- [2] **ID.—CROSSING OF STREET BY PEDESTRIAN—CARE REQUIRED.**—There is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, but the question of negligence, under the usual rule of ordinary care that devolves upon foot-travelers, must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers.
- [3] **ID.—DUTY OF MOTORISTS TRAILING OR PASSING CARS—ABILITY TO COMPLY WITH MUNICIPAL ORDINANCE.**—In view of the obvious danger of passing street-cars when they stop for the accommodation of passengers, it behooves motorists neither to trail cars so closely that they cannot comply with a municipal ordinance which requires them to stop at least ten feet in the rear of such street-car, nor to attempt to pass a street-car at a regular stopping point until they are sure that there will be no stop.
- [4] **ID.—MEASURE OF DAMAGES—PROVINCE OF TRIAL COURT—APPEAL.**—The amount of damages to be allowed the plaintiffs for the death of their daughter due to the negligence of the defendants is a matter peculiarly within the province of the trial court, and its action will not be disturbed on appeal unless the amount is so disproportionate to the injury as at first glance to shock the conscience.
- [5] **ID.—FUNERAL EXPENSES—PLEADING—FINDING—EVIDENCE.**—In such action, an allegation that certain indebtedness covering the cost of burial had been incurred is sufficient to support a finding that plaintiffs were damaged to that amount; and the defendants will not be heard to contend on appeal that the damages should not have included that amount because the bill was not paid by either of the plaintiffs, where the colloquy between counsel at the time

2. Duty of pedestrians to look out for automobiles, notes, 3 L. R. A. (N. S.) 345; 20 L. R. A. (N. S.) 232; 38 L. R. A. (N. S.) 488; 42 L. R. A. (N. S.) 1179.

the bill was offered in evidence was sufficient to sustain the implied finding that, though the bill was made out to the brother of the deceased, the expense was incurred by plaintiffs, and counsel for defendant stated at that time that he would not raise any objection to the bill.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. B. Drake for Appellants.

G. C. De Garmo for Respondents.

BRITTAIN, J.—The defendants, sued as husband and wife, by the parents as heirs of Mae C. Koehl, who died as the result of being struck by an automobile driven by Mrs. Carpenter, appeal from a judgment for \$1,000 rendered by the trial court sitting without a jury. The appellants rely on three grounds which will be disposed of in the order of their presentation, after the following statement of facts shown by the record:

Mae Koehl was between twenty-one and twenty-two years of age. She had previously been employed as a cashier in a business concern in Los Angeles. She was out of employment for about a month during which time she remained at home, helping with the household duties. She then went to work as an assistant bookkeeper in the office of her father, who, with his son, was engaged in the manufacturing business. She had been so occupied about a month, and was acquainted with the streets in Los Angeles and with the particular crossing, near her place of business, where the accident occurred.

At the time of the accident, in November, 1917, there was, and had been from some time in 1914, an ordinance of the city of Los Angeles which provided that it should be unlawful for the driver of any vehicle, "upon overtaking any street or interurban railway car which has stopped for the purpose of discharging or taking on any passengers, to fail, neglect or refuse to stop such vehicle at least ten feet in the rear of such . . . car and to keep such vehicle standing where so stopped until such passengers or intending pas-

sengers have safely alighted from or boarded said . . . car, or until such . . . car shall have started."

About noon on November 27, 1917, Mae Koehl was a passenger on a street-car running west on Seventh Street, and told the conductor to stop the car at Anderson Street. The car stopped on the east side of Anderson Street at the corner and she alighted, starting to walk diagonally in a northwesterly direction toward the sidewalk at the corner of Seventh and Anderson Streets. The conductor heard a scream and the car, which had started and had gone a few feet, again stopped. The conductor saw her reach a point three or four feet from the curb line when she was struck.

Mrs. Carpenter was driving her motor west on Seventh Street, trailing the street-car, and had been following it for several blocks. At the time of the accident, she testified she was moving at the rate of about ten miles per hour. She did not stop the automobile, nor did she sound any warning as she approached the crossing. She testified that she thought the car was slowing down for the crossing, that when she saw Miss Koehl in the act of alighting she screamed, and being afraid that the brakes would not hold she turned the machine sharply to the right to avoid the impending collision. She did not run it into the sidewalk, but turned it so that it continued its course westerly near the curb. She testified that the brakes were in good order, and that at the rate at which she was traveling she could have stopped the car in about five feet. The street-car had been running at about six or eight miles an hour, and as it reached Anderson Street Mrs. Carpenter turned from immediately behind it to the north side to pass it while crossing Anderson Street. She testified she had put on the foot-brake, but when she struck Miss Koehl she lost control of herself and did not know what happened. When she first saw Miss Koehl she was ten or fifteen feet away. Miss Koehl was struck when she was near the curb line of Anderson Street and her body was carried nearly to the middle of the street, the automobile running over her and for ten to fifteen feet beyond.

During the trial the plaintiffs' attorney said: "Here is a list of the costs of burial, subject to your objections as to some items." The attorney for the appellants replied: "Yes, Bresee Brothers have put it in. I suppose we have to pay

these things when we die. I will not raise any question about it." The document was marked plaintiffs' exhibit 3, and was in the form of a receipted bill of Bresee Brothers, undertakers, for \$272.50, funeral expenses of Mary Koehl. It was made out to Albert Koehl, a brother of Miss Koehl.

[1] The appellants argue that Miss Koehl was guilty of contributory negligence. This court cannot so determine as a matter of law in view of all the circumstances. Considered as a question of fact, it was determined by the trial court adversely to the appellants. There was sufficient evidence to sustain its finding. In such a case that finding will not be disturbed on appeal. The rules of law concerning the respective rights and obligations of persons using the public streets recently received lengthy consideration by the supreme court. [2] It was there held that there is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and that the question of negligence, under the usual rule of ordinary care that devolved upon foot-travelers, must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers. (*Mann v. Scott*, 180 Cal. 550, [182 Pac. 281].)

[3] It is argued that the ordinance was only operative against those automobile drivers who are so far back of a street-car as to be able to stop ten feet in the rear of the street-car when it stops for the purpose of taking on or discharging passengers. There are two answers to this contention. Cars ordinarily stop for those purposes at street corners. In view of the obvious danger of passing cars when they do stop for the accommodation of passengers it behooves motorists neither to trail cars so closely that they cannot comply with the ordinance nor to attempt, as Mrs. Carpenter did, to pass a car at a regular stopping point until they are sure that there will be no stop. Further the court is of the opinion that regardless of the provisions of the ordinance, there is ample evidence to sustain the judgment.

[4] It is next contended that the damages are excessive, but the amount of damages is a matter peculiarly within the province of the trial court, and its action will not be disturbed unless the amount is so disproportionate to the injury

as at first glance to shock the conscience. This does not appear to be the case in the present instance. (*Martin v. Shea*. 182 Cal. 130, [187 Pac. 23].)

[5] Lastly it is contended that the damages should not have included the amount paid to the undertaker, because the bill was not paid by either of the plaintiffs. The allegation of the complaint was that these expenses had been incurred. This was sufficient to support the finding that the plaintiffs had been damaged to the amount of \$1,000, including funeral expenses of \$272.50. The colloquy between counsel at the trial regarding the funeral expenses is sufficient to support the implied finding that though the bill was made out to the brother of Miss Koehl, the expense was incurred by her parents, the plaintiffs. If timely objection had been made, the plaintiffs might have supplied the missing proof. After the statement of counsel for the appellants that he would not raise any objection about it, referring to the list of costs of burial, that objection will not be seriously considered here.

The judgment is affirmed.

Nourse, J., and Langdon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent, and Olney, J., who did not vote.

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[Civ. No. 3373. First Appellate District, Division Two.—May 21, 1920.]

GUS A. PETERSON, Respondent, v. R. W. LIGHTFOOT, Appellant.

[1] PARTNERSHIP—SUIT FOR ACCOUNTING—INTERLOCUTORY JUDGMENT—RIGHT OF APPEAL.—A judgment in a suit for partnership accounting, which provides that the assets of the partnership be sold by a commissioner and, upon the return of the commissioner and the equal division of the assets between the parties, a final judgment be entered, is, in legal effect, a final judgment from which an appeal will lie.



- [2] **ID.—NATURE OF RELATIONSHIP—EVIDENCE—FINDING.**—In such an action, if there is evidence to support the finding of the trial court that the partnership was not one of profits only, such finding is controlling on appeal.
- [3] **ID.—EQUITABLE JURISDICTION OF COURT.**—A suit for partnership accounting is one addressed to the equitable jurisdiction of the court.
- [4] **ID.—PARTNERSHIP NAME—WHEN AN ASSET.**—In a suit for partnership accounting, a name which had been used by one of the partners prior to the formation of the partnership, but which was worthless when the partnership was formed, is properly considered as a partnership asset where, after the formation of the partnership, it was made valuable by the joint efforts of the partners.
- [5] **ID.—SECRET RECORDATION OF NAME BY PARTNER—EFFECT OF.**—The act of the partner who had used such name prior to the formation of the partnership, after the formation of the partnership, but without the knowledge of his copartner, in causing such name to be registered in the office of the Secretary of State in his own name would not cause any diminution of the rights of his copartner.

**APPEAL** from a judgment of the Superior Court of San Bernardino County. H. T. Dewhirst, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. A. Alderson for Appellant.

Halsey W. Allen for Respondent.

**BRITAIN, J.**—The defendant appeals from a judgment in a suit for partnership accounting. The judgment provided that the assets of the partnership be sold by a commissioner, and upon the return of the commissioner and the equal division of the assets between the parties, a final judgment be entered dissolving the partnership or declaring it dissolved.

[1] The respondent contends that the judgment is a non-appellable interlocutory order. The findings and conclusions of law finally determined the rights of the parties, leaving only the transmutation of the assets into cash and their equal division to be done. The appellant claims that the court was in error in determining that the assets ordered to be sold belonged to the partnership and he claims ownership of them himself. If his contentions in this regard

should be sustained by the appellate court after the sale of his property, he would be without remedy or find himself compelled to resort to a doubtful remedy against the purchaser at the commissioner's sale. For all practical purposes of disposing of the issues tried the judgment was final. "The question, as affecting the right of appeal, is not what the form of the order may be, but what is its legal effect." (*Estate of West*, 162 Cal. 352, [122 Pac. 953]; *Byrne v. Hoag*, 126 Cal. 283, [58 Pac. 688]; *People v. Bank of Mendocino County*, 133 Cal. 107, [65 Pac. 124]; *Clark v. Dunnam*, 46 Cal. 204.)

[2] There was no written agreement by which the partnership was formed. From the oral testimony of the partners and others, the trial court found that the claim of the appellant that the partnership was one of profits only was not sustained. There was evidence to support this finding and it is controlling on this appeal. The appellant states that there is but one question to be determined, and that is whether the name "Redlands Auto Service" was a part of the assets of the partnership.

From the findings it appears that in May, 1914, the defendant purchased an automobile on which he caused to be painted the name in question. For about three weeks he operated the machine for hire under that name to designate the business in which he was engaged. In June he associated with himself, his brother, who owned another automobile, which was thereafter similarly used. The partnership business was operated under the firm name of "Redlands Auto Service." Shortly after, during the same month, the plaintiff became a member of the partnership, he contributing \$640 to the common fund, that being the value of each of the machines then used in the business. In April, 1915, the defendant's brother sold his interest to the partnership, then composed of the parties to this suit. Thereafter the business was carried on under the same name it had been carried on from the time the first partnership was formed. In December, 1914, while the partnership was composed of the three men, the defendant caused the name "Redlands Auto Service" to be registered in the office of the Secretary of State in his own name. This was done without the knowledge of the plaintiff, who was not informed of the fact until after the dissolution of the partnership in July, 1918.

During all the intervening time the business of the partnership was carried on under that name. It was further found, and the finding is supported by the evidence and by reasonable inferences therefrom, that at the time of the formation of the partnership the name had no value, but by the joint efforts of the partners in conducting the business from June, 1914, to July, 1918, when the partnership was dissolved, "the goodwill of the partnership business, including the right, title, and interest of said partnership in said firm name, became, and at the time of the dissolution of said partnership was, and now is, of the value of \$800."

The appellant's contentions that the adoption and use of a trade name immediately fixes its status as personal property, and that a single act of use with the intent to continue that use confers a right in the original user may be conceded without affecting the propriety of the judgment. [3] The suit for partnership accounting is one addressed to the equitable jurisdiction of the court. (*Andrade v. Superior Court*, 75 Cal. 459-463, [17 Pac. 531].)

[4] Under the facts found, even though the name was originally owned by the appellant, the court, in adjusting the respective interests of the parties, properly considered all the circumstances. The name, which had been used for three weeks, was of no value. The respondent went into the business carried on by the appellant at the request of the latter as a partner. It was agreed that the appellant's automobile, which had value, should be used in the business, but the ownership retained. It was also agreed that the money invested in the business by the respondent should be used for the purchase of a machine. Before the termination of the partnership each of the partners had in use in the business two automobiles owned by them separately. On dissolution each retained his own tangible property. The name which was worthless when the partnership was formed was an asset and apparently the only asset of the business at that time. It was made valuable by the joint efforts of the two partners. If it had been some other kind of tangible personal property so worthless as not to have been the subject of agreement, but a part of the business establishment when the partnership was formed, and had had bestowed upon it the work of both partners for a period of three years, in use constantly as partnership

property and without claim by the original owner, until at the time of the dissolution it came to have a substantial value produced solely by their joint work, it would be manifestly inequitable that it should be given to one only of the two who had produced the value.

[5] It is said in the appellant's brief that the recordation of the name added nothing to his common-law rights. Neither could the secret recordation of the name by the appellant cause any diminution of the rights of his partner. The relationship was confidential and the recordation by one of the partners of the name under which the partnership had been doing business for six months, in contemplation of law, was in the interest of the partnership.

From an examination of the entire record it does not appear that incidental matters touched upon in the briefs require notice here.

The judgment is affirmed.

Langdon, P. J., and Nourse, J., concurred.

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[Civ. No. 3374. First Appellate District, Division Two.—May 21, 1920.]

**JAMES E. SMITH, Appellant, v. PHELIA L. P. SMITH  
et al., Respondents.**

- [1] **HUSBAND AND WIFE—TITLE TO PROPERTY—HOW ACQUIRED—CONFLICTING EVIDENCE—FINDING—APPEAL.**—In an action in which both the husband and the wife claim title to certain real property, notwithstanding a conflict in the evidence, a finding of the trial court that the wife acquired by assignment from her sister, as a gift, the latter's equity in a contract for the purchase of the property, is conclusive on the appellate court.
- [2] **ID.—EARNINGS OF WIFE—NATURE OF—WHEN SEPARATE PROPERTY.** Although the earnings of the wife during marriage are, as a rule, community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property.
- [3] **ID.—AGREEMENT AS TO SEPARATE CHARACTER OF WIFE'S EARNINGS—HOW PROVED.**—An agreement between a husband and wife that

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2. What is community property, note, 126 Am. St. Rep. 99.

the earnings of the latter shall be her separate property may be proved by evidence as to the acts and conduct of the husband with relation to the earnings of the wife or business conducted by her as community property indicating that he did not regard them as community property.

- [4] **ID.—RELINQUISHMENT OF BUSINESS TO WIFE—SEPARATE PROPERTY.** In this action involving, among other things, the right of a wife to a millinery business conducted by her and to the earnings derived therefrom, the evidence as to the manner in which the business had been conducted showed that it had been relinquished by the husband to the wife and had become her separate property.
- [5] **ID.—IMPROVEMENT OF WIFE'S PROPERTY—EXPENDITURES BY HUSBAND.**—The expenditures by a husband of either his separate funds or the common funds of himself and wife in improving his wife's separate property does not operate to change the title. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

H. S. Laughlin and Muhleman & Crump for Appellant.

Swaffield & Swaffield and Roland G. Swaffield for Respondents.

**NOURSE, J.**—Action to quiet title. Judgment was rendered in favor of defendant on her cross-complaint, from which plaintiff appeals.

Plaintiff and defendant Phelia L. P. Smith are husband and wife. The property which is the subject of this litigation consists of a lot, with dwelling-house thereon, situate in Long Beach, California. The complaint alleged that, at the time of the commencement of this action, plaintiff was the owner and in possession of the lot in question; that said lot was purchased and improved subsequent to the marriage of plaintiff and defendant Smith with the separate funds of plaintiff and the community funds of plaintiff and defendant Smith, and the deed for convenience was taken in the name of defendant Smith; that defendant Smith had encumbered the same by giving a trust deed to defendant The Title Insurance and Trust Company to secure the repayment of money had from defendant Long Beach

Savings Bank and Trust Company, and had used the money thus acquired without the knowledge or consent of plaintiff to the detriment of plaintiff and his interests in said property. Defendant Smith answered and cross-complained, denying the allegations of the complaint and setting up title in herself as her separate property and estate. The trial court found that the property was neither purchased with the separate funds of plaintiff and the community funds of plaintiff and defendant Smith, nor the separate funds of plaintiff. On the contrary, the court found that defendant Smith acquired, by assignment from her sister, as a gift, her equity in a contract for the purchase of lot 8, on which the sister had paid the sum of \$335, leaving an unpaid balance of \$165, which defendant Smith thereafter paid out of her separate funds.

Appellant contends that the property in question is community property because it was acquired subsequent to marriage and with community funds.

[1] This contention is based upon the testimony of appellant that the assignment was not made as a gift to his wife, but that she purchased her sister's equity in the lot for fifty dollars which he furnished for that purpose. This merely created a conflict in the evidence, and the finding of the court that it was a gift is conclusive as to that fact. Appellant further argues that the \$165 balance paid by defendant Smith on the purchase price of the lot was money derived from a millinery business conducted by Mrs. Smith subsequent to their marriage and hence was community property.

[2] Although the earnings of the wife during marriage are, as a rule, community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property. (*Wren v. Wren*, 100 Cal. 276, 279, [38 Am. St. Rep. 287, 34 Pac. 775]; *Larson v. Larson*, 15 Cal. App. 531, 535, [115 Pac. 340].)

[3] Such an agreement may be proved by evidence as to the acts and conduct of the husband with relation to the earnings of the wife or business conducted by her as community property indicating that he did not regard them as community property. (*Larson v. Larson*, *supra*; *Kalt-schmidt v. Weber*, 145 Cal. 596, 599, [79 Pac. 272].) [4]

Respondent Smith testified that she started the millinery business with \$200 received from the sale of property concededly her separate estate. This was denied by appellant, who claimed that he advanced the \$200 to help her start the business. But, as significant of his attitude with relation to that business, he testified: "The proceeds from that store were kept in her personal bank account. I had no access to that bank account. I knew when she started the business and ran the bank account along that way. . . . I knew that she started her bank account. The bank account was in her own name. . . . I had a bank account and she had hers, and I do not think either had access to the other's account. She paid the bills for that millinery business out of her account except the first one; that was the money I let her have to start it with, that is, the big bill, \$200 or \$250, except for that she paid the bills out of her own account and she ordered the goods, selected them and determined what they should be. That was the way it always was from the beginning." It is apparent from an examination of the entire evidence that plaintiff made no claim to the business but treated it as his wife's separate property. The right to the millinery business and the earnings derived therefrom having been thus relinquished by plaintiff to his wife, they did, in fact, become her separate property.

[5] The only other question for determination is whether the original character of the lot was changed by the improvements erected thereon, which consisted of a dwelling-house costing in the neighborhood of \$3,000. The trial court found on conflicting evidence that all improvements were made by respondent Smith out of her separate estate and property; that appellant from time to time advanced some moneys and funds out of his own separate estate and out of the community property, which were used in the improvements; that all such advancements were made by appellant as a gift to respondent Smith as and for her own separate estate and property; and that all improvements now on the real property are the sole and separate property and estate of respondent Smith, and that appellant has no interest in either the land or improvements thereon. The findings on the facts are conclusive; the conclusions of law drawn therefrom are supported by the authorities. The expenditure by a husband of either his separate funds or the community

funds of himself and wife in improving his wife's separate property does not operate to change the title. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land. (*Carlson v. Carlson*, 10 Cal. App. 300, 303, [101 Pac. 923]; *Shaw v. Bernal*, 163 Cal. 262, 267, 268, [124 Pac. 1012].) Appellant does not claim that there was any agreement that the property should become community property. Where no agreement has been made "it must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate and that it was intended to accrue to her interest." (*Carlson v. Carlson*, *supra*.)

The judgment is affirmed.

Brittain, J., and Langdon, P. J., concurred.

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[Civ. No. 3378. First Appellate District, Division Two.—May 21, 1920.]

JESSE GEORGE et al. (Copartners), Respondents, v.  
ELIZABETH G. CLARKE STENSLAND, Appellant.

- [1] HUSBAND AND WIFE—ACTION AGAINST WIFE—FAILURE TO SERVE HUSBAND—HARMLESS ERROR.—Where a wife is sued for legal services contracted by her while an unmarried woman, and concerning matters connected with her separate estate, and her husband, a practicing attorney, though joined as a party defendant under the designation John Doe, is not served with a copy of the summons and he does not appear therein, but he aids and conducts her defense and represented her in every stage of the litigation and has actual notice of everything that occurs, and no objection is raised to the defect of parties defendant at any stage of the proceedings, nor to the entry of judgment against the wife alone, the failure to serve the husband is harmless error and under section 4½ of article VI of the constitution is no ground for reversal.
- [2] ID.—JUDGMENT—NAME OF DEFENDANT—WAIVER OF OBJECTIONS.—Where a married woman is sued by her name before marriage, and she answers in that name, but at the trial she admits her proper name and adopts the latter name in her notice of appeal, she cannot complain that judgment was entered against her in the name which she admits is her proper name, the two persons being completely identified in the record as herself.



APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge. Affirmed.

The facts are stated in the opinion of the court.

Theodore Stensland and J. T. Reed for Appellant.

Jesse George and Charles B. McCoy, *in pro. per.*, for Respondents.

LANGDON, P. J.—This is an appeal by the defendant, Elizabeth G. Clarke, from a judgment entered on a verdict of a jury for \$514, in the superior court of San Diego County, in an action for the recovery of the reasonable value of attorneys' fees for professional services rendered by the plaintiffs to the appellant.

This appeal was originally taken not only from the judgment, but also from an order denying a new trial, and from an order of nonsuit on a cross-complaint, and from an order made in proceedings supplementary to judgment and execution. It is stated, however, by the appellant in her opening brief, that she "waives and abandons any and all her rights to appeal from said order denying a new trial, and from said order in supplementary proceedings," and prosecutes her appeal exclusive thereof.

[1] The principal point argued by the appellant, and the one she states to be the important feature of the case, is that the judgment was erroneously entered by reason of the fact that said judgment was entered against a married woman in a cause in which she was sued as the wife of another party defendant, named in the complaint as "John Doe," and said husband of appellant was not served with summons in the action.

The facts pertinent to a discussion of the objection present some unusual features, and it will be necessary to state them rather fully. The plaintiffs sued, as aforesaid, to recover for legal services. The defendants named in the complaint are Elizabeth G. Clarke and John Doe. It is set out in the complaint that the services for which recovery is sought were contracted for by the defendant, Elizabeth G. Clarke, "being then and there an unmarried woman, and in the management of her own affairs." It is further set out

in the complaint as follows: "Plaintiffs further allege that they are informed and believe, and on such information and belief allege, that since this cause of action accrued, the defendant, Elizabeth G. Clarke has married one John Doe, whose true name is unknown to these plaintiffs, but the plaintiffs have not sufficient information to determine whether or not, if defendant is married, her husband is a necessary party defendant, and plaintiffs pray that if it shall appear that the said defendant, Elizabeth G. Clarke is married and that her husband is a necessary party, he may be joined and his true name as defendant herein inserted, and that the true name of the defendant, Elizabeth G. Clarke be inserted herein in the event that she is shown to be married." Answer and cross-complaint was filed by Elizabeth G. Clarke, in which she did not deny the allegation of the complaint upon information and belief, with reference to her marriage. She made no mention of this allegation in any way, and answered under the name of Elizabeth G. Clarke. Appellant's position is that as the allegations of the complaint regarding defendant's coverture were admitted by a failure to deny the same, that it became the duty of the plaintiffs to ascertain, by deposition or otherwise, the name of her husband, and to substitute such name for the fictitious name and serve him with summons.

The plaintiffs did, however, attempt to ascertain the facts regarding defendant's marriage by their demurrer to the answer and cross-complaint, in which demurrer one of the grounds urged is: "The said answer to plaintiffs' first cause of action is uncertain in that the said answer admits that the defendant Elizabeth G. Clarke is married, by failing to deny the allegation of the complaint that she is married, but does not give her true name nor the true name of her husband, nor allege or set forth facts from which it can be determined whether or not her husband is a proper or necessary party defendant." Another ground of demurrer to the answer and cross-complaint is that cross-complainant, Elizabeth G. Clarke, has not legal capacity to sue in that she admits in her answer and cross-complaint that she is married, and that the cross-complaint does not show that the action is one within any of the exceptions mentioned in section 370 of the Code of Civil Procedure. This demurrer was overruled, obviously because the property sought to be

recovered under the cross-complaint was alleged to have been the sole and separate property of Elizabeth G. Clarke, and for the recovery of such property she had the right to sue alone. The attorney filing the cross-complaint was Theodore Stensland, and he appears throughout as attorney of record for the defendant Elizabeth G. Clarke. In the answer to the cross-complaint, plaintiffs allege: "Plaintiffs and cross-defendants are informed and advised and therefore allege the fact to be that at the time when the defendant Elizabeth G. Clarke claims to have become the owner of the draft mentioned and described in the first paragraph of her cross-complaint, and for some time prior thereto, the said defendant and cross-complainant was the wife of Theodore Stensland, her attorney herein; that the exact date of the marriage of the said Elizabeth G. Clarke and Theodore Stensland is unknown to these plaintiffs and cross-defendants; that Elizabeth G. Clarke is not the true and proper name of the defendant and cross-complainant, and John Doe is not the true name of the husband of the said defendant and cross-complainant, Elizabeth G. Clarke, but that the true name of said Elizabeth G. Clarke is Elizabeth G. Stensland, and the true name of the husband of the said Elizabeth G. Clarke is Theodore Stensland, who was and is her attorney herein, and that there are no facts set forth in said cross-complaint establishing or tending to establish that Theodore Stensland is not a necessary party cross-complainant and defendant as hereinafter more specifically set forth and shown."

After the granting of motions to strike out portions of the answer to the cross-complaint, relating to the necessity of joining appellant's husband as a cross-complainant, the cause went to trial upon these pleadings. Plaintiffs never amended their complaint by inserting the true name of the husband of Elizabeth G. Clarke. It does not appear in the record that the husband was or was not served under the fictitious name or otherwise. It would seem, therefore, that in support of the judgment, we must assume that the service was duly made. However, even in the absence of this assumption, and assuming for the moment that the record must affirmatively show that the husband was served, we do not believe this error calls for a reversal of the judgment under the peculiar facts presented for our consideration.

Defendant Elizabeth G. Stensland did not object to the defect of parties by either demurrer or answer, nor otherwise, and upon the verdict of the jury upon the essential questions of fact involved, the court rendered judgment against her alone.

Reliance is placed by the appellants upon the cases of *McDonald v. Porsh*, 136 Cal. 301, [68 Pac. 817], and *Fassio v. Woolfrey*, 37 Cal. App. 754, [174 Pac. 700], holding that the husband, being a necessary party defendant in cases where the wife is sued, he must not only be named in the complaint, but served with summons. Respondent's reply to this contention is that under the holding in the case of *Bogart v. Woodruff*, 96 Cal. 609, [31 Pac. 816], it is said that although the husband is a necessary party defendant and the failure of plaintiff to make him a defendant would defeat his right of recovery if objection be properly presented, yet it is further provided by section 434 of the Code of Civil Procedure, that if no objection be taken to the defect of parties, either by demurrer or answer, the defendant must be deemed to have waived the same.

We are not unmindful of appellant's position that she could not properly demur for nonjoinder of parties since her husband was joined in the complaint as John Doe; that she had a right to expect that he would be served with summons in due time. However, she did not object to the entry of the judgment upon this ground, and her situation with reference to the demurrer would be of more weight and importance under other circumstances than those presented to us here. For the peculiar facts of this case certainly show that the defendant was not deprived of any possible right or advantage by reason of this oversight; that the purpose of the code provision in question has not been subverted by plaintiffs' inadvertence, and that the case presents, clearly, a situation designed to be covered by section 4½, article VI, of our constitution. The husband of appellant is admitted to be a practicing attorney, and to have represented his wife in every stage of the litigation herein involved; he had actual notice of everything that occurred; he is not bound by the judgment and could not have been. The judgment relates to a matter connected with the wife's separate estate and to transactions occurring previous to the marriage. It is said in *McDonald v. Porsh*, *supra*, and in the

case of *Terry v. Superior Court*, 110 Cal. 85, 88, [42 Pac. 464], and some others, that the code provision for joining the husband in such actions is not to the end that the husband or his property may be bound by the judgment, but solely that he may be able to aid his wife in her defense. Under the peculiar facts of this case, this purpose was fully accomplished, for the husband aided and conducted her defense at every step.

It would seem, therefore, that this is essentially one of those harmless errors which does not affect the merits of the judgment, and which comes within the remedial influence of the aforementioned amendment to our constitution. It is held in *Work v. Campbell*, 164 Cal. 343, 349, [43 L. R. A. (N. S.) 581, 28 Pac. 943], in *Lamb v. Harbaugh*, 105 Cal. 680, 690, [39 Pac. 56], and in *Baldwin v. Second Street etc. Co.*, 77 Cal. 390, [19 Pac. 644], that a defect of parties is not a matter going to the jurisdiction of the court; and indeed that holding necessarily follows from the holding in many cases that it is a defect which may be waived by failure to demur.

[2] Some objection is made by appellant that the judgment is entered against her as Elizabeth G. Clarke Stensland. In her testimony on the trial, she stated that her name at that time was Elizabeth G. Clarke Stensland, but that she might be called by either the name of Clarke or Stensland. It is to be noted that she answered under the name of Clarke, and only upon her examination at the trial did she admit that her proper name was then Stensland. She has adopted the name of Stensland in her notice of appeal. The two persons are completely identified in the record. It would appear, therefore, that appellant has no complaint that judgment was entered against her in the name which she admits is at present her proper name. (*Thompson v. Alford*, 135 Cal. 52, [66 Pac. 983]; *Alameda County v. Crocker et al.*, 125 Cal. 101, [57 Pac. 766]; *Bogart v. Woodruff*, *supra*.)

Some further objections are made by appellant with regard to the giving of instructions by the court, but we consider these to be without merit.

The judgment is affirmed.

Nourse, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 3187. Second Appellate District, Division Two.—May 21, 1920.]

**F. D. JIMENO, Appellant, v. COMMONWEALTH HOME BUILDERS (a Corporation), et al., Respondents.**

- [1] **LIBEL—WORDS ACTIONABLE PER SE—DAMAGE—PLEADING.**—Words written or printed may be libelous and actionable *per se*, that is, actionable without any allegations of special damage, if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of their friendly intercourse or society, even though the same words, if spoken, would not have been actionable.
- [2] **ID.—WHEN PUBLICATION LIBELOUS PER SE.**—If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se*, and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence.
- [3] **ID.—IMPUTATION OF DISHONEST PRACTICES.**—A printed and published article which imputes to plaintiff grave and reprehensible misconduct—dishonest practices which, if established, would justly bring him into general contempt and disgrace—is libelous and actionable *per se*.
- [4] **ID.—CONSTRUCTION OF PUBLICATION—CONSIDERATION AS WHOLE.**—The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer.
- [5] **ID.—VIOLATION OF CONFIDENCE—TREACHERY TO ASSOCIATES—EFFECT OF WRITING.**—A writing that charges another with violating a confidence that has been reposed in him or with treachery to his associates is actionable *per se*.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Reversed.

The facts are stated in the opinion of the court.

N. C. Folsom and Jesse A. Gyger for Appellant.

No appearance for Respondents.

FINLAYSON, P. J.—This is an action for libel. Defendants demurred to plaintiff's second amended complaint upon the grounds that it does not state a cause of action and that, in certain particulars, it is uncertain, ambiguous, and unintelligible. The demurrer was sustained. Plaintiff declined further to amend, and judgment for defendants was entered accordingly. From that judgment plaintiff appeals.

The extrinsic circumstances alleged in the complaint by way of inducement and to be considered in connection with the alleged libel are these: Plaintiff, an investment broker, dealing in real estate and mining investments, was, at all times mentioned in the complaint, a stockholder in the defendant corporation, Commonwealth Home Builders, and chairman of a committee of stockholders organized to investigate the affairs of that corporation and protect the rights and interests of all its stockholders. The investigating committee was organized at the instance of plaintiff, with the advice and assistance of one C. E. Norton, a reputable auditor. Prior to the publication complained of, plaintiff was a stockholder in, and had been active in the promotion of, the Stone Chief Mining Company, a corporation.

The complaint alleges that, for the purpose of exposing plaintiff to contempt, hatred, ridicule, and obloquy, defendants maliciously published and circulated in the "American Globe," a magazine, among the stockholders of the defendant corporation, of and concerning plaintiff, the following false and defamatory articles:

**"NORTON'S FILIBUSTER EXPEDITION ON COMMONWEALTH HOME BUILDERS—A FIZZLE.**

"C. E. Norton, President of Original Home Builders of Los Angeles, as well as trustee for a little more than half of the stock, also a director of the Southern California Home

Builders, in conjunction with Mr. Jimeno, an official and promoter of the Stone Chief Mining Co., and a stockholder of Commonwealth Home Builders, entertained some twenty-five stockholders of Commonwealth Home Builders, in the office of the Stone Chief Mining Co. on the evening of December 1, 1916. The editor of the American Globe received no notice of this happening, but did manage to secure just the information desired by stockholders who do not desire their wealthy corporation wrecked. . . . The little gathering seemed to be a cooked and dried affair. . . . As usual money was desired. It seems that the 4000 stockholders are to contribute on the assessment basis of so much per share (to these men) which has not the sanction of the present sane and responsible administration, and no statement rendered—no questions asked. An unauthorized bill for \$150 was presented by Mr. Jimeno, of the Stone Chief Mining Co. . . . ”

#### “PROTECTIVE SYSTEM OF RUINING STOCKHOLDERS.

“Money greed will cause some people to do anything as long as they are able to keep out of jail. . . . The stockholder calls on a so-called auditor about whose antecedents no one knows anything, and whose record in corporation activities has never shown a clean winding up of affairs for stockholders of the other corporations concerned. The master brain (!) so steeped with greed for gold as to care nothing for the majority of stockholders’ interests, whom he terms ‘boobs’ autocratically rises to the occasion. He maps out the campaign in such a manner as to prevent himself from being caught on conspiracy-to-wreck-corporation charges. ‘This will cost you nothing. I will get you in control of that corporation and between you and me we ought to milk it for a long time.’ ‘But I do not understand the building and investment company business,’ replies the stockholder. ‘I have had some experience in oil, mining and wild-cat schemes, though, if that would do any good.’ Any office boy can do what you are to do, replied the self-styled auditor. . . . I will have another man look for certain information which we twist into such shape as to put the management of that building and investment company on the defensive. Anything to arouse suspicion and shatter confidence and the credit of the company. We don’t care how many



business deals we knock out, thereby depriving the stockholders of future profits, neither do we care how much damage we may cause the company otherwise, or how much expense we put it to, all of which affects the assets of stockholders. . . . Stockholders who satisfy themselves about the character and former business records of such 'Money Greed Meddlers' and corporation wreckers . . . would hardly be inclined to give these 'Intolerance Individuals' their support, proxies or votes. They have nothing at stake. . . . Protective Committee (!) composed of so-called auditor and stockholder receive: (1) Contributions from stockholders to carry on campaign of wrecking their own company, of which no account is given and which could run into some thousands of dollars. . . . Fine business for the auditor and stockholder but rather coarse financiering."

Respondents have not favored us with any printed points or authorities, and we are, therefore, somewhat in the dark as to the precise reasons for their attack upon the complaint. At the oral argument, their counsel contented themselves with the bare statement that nowhere in the complaint has plaintiff alleged any special damages. From this we infer that the chief, if not the only, ground relied upon by respondents, is the absence of an allegation of special damages. If, as we believe, the alleged defamatory publication is libelous *per se*, then no allegation of special damages is necessary. The courts have long recognized a distinction between written and oral defamation. While whatever charge will sustain a suit for slander when the words are merely spoken will sustain a suit for libel if they are written or printed and published, yet many charges which if merely spoken of another would not be actionable without proof of special damages will be libelous *per se* when written or printed and published. [1] Accordingly, it may be stated as a general proposition that words written or printed may be libelous and actionable *per se*, that is, actionable without any allegations of special damages, if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of their friendly intercourse and society, even though the same words, if spoken, would not have been actionable. (25 Cyc. 250.) [2] If, on its face, the publication is of a character that usually,

ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se*, and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence.

Some of the defamatory language in the libelous articles published by defendants manifestly refers solely to the auditor, C. E. Norton. Other defamatory portions of the articles seem to be aimed at both plaintiff and Norton, as, for example, the reference to "money greed meddlers." Still other portions leave the reader, ignorant of the extrinsic facts, in doubt as to whether Norton or plaintiff is the one referred to. By no *colloquium* could the pleader make applicable to plaintiff those words that obviously apply to Norton only. As to all the other defamatory charges, the broad allegation that the matter in the articles was published of and concerning plaintiff is sufficient to permit proof that the readers who knew the extrinsic circumstances understood that the words referred to plaintiff. (Code Civ. Proc., sec. 460; *Harris v. Zanone*, 93 Cal. 59, [28 Pac. 845].)

[3] We think the article is libelous and is actionable *per se*. Our code defines libel as follows: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, sec. 45.) As said in *Tonini v. Cevalasco*, 114 Cal. 272, [46 Pac. 105], this definition "is very broad, and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally or with respect to his occupation."

If, as alleged, the defamatory matters were printed and published of and concerning plaintiff, no unprejudiced person of ordinary intelligence, reading the publication, could avoid the conclusion that it imputed to him grave and reprehensible misconduct—dishonest practices which, if established, would justly bring him into general contempt and disgrace. Upon its face, the language charged, if published of and concerning plaintiff, tended naturally, necessarily,

and proximately to produce some, at least, of the results mentioned in section 45 of the Civil Code.

[4] To test its libelous quality a publication must be considered as a whole. "The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." (*Cooper v. Greeley*, 1 Denio (N. Y.), 359.) Thus in the case cited, the charge was not "made in an open and direct manner," "but," it was said by the court, "an imputation made in that form is not the less actionable." In our opinion the *innuendoes*, as alleged in the complaint in this case, affix to the words their true meaning. It is alleged, by way of *innuendo*, that the language of the publication was intended to mean, and that the persons who read it understood it to mean, that "plaintiff had been connected with wildcat or fraudulent schemes in the past, and that plaintiff would 'do anything' so long as he should be 'able to keep out of jail'; that he had conspired with another to obtain information concerning the corporation Commonwealth Home Builders, and 'twist' such information into such shape as to rouse suspicion and shatter confidence and the credit of the company and to decrease the assets thereof for the purpose of obtaining a profit for himself, and that said plaintiff and one other are 'money greed meddlers and corporation wreckers'; that the plaintiff was attempting to get on a 'big pay roll,' and that the plaintiff was attempting unconscientious and 'coarse financiering.'" We think the language of the articles warrants the construction thus put upon it by plaintiff, and that the effect of the publication was to expose plaintiff to "obloquy," which is defined by Webster as "blame; reprehension." Surely no intelligent person could read this publication without understanding that it was meant to charge that plaintiff is not an honorable man—that he is a person who had been guilty of such reprehensible misconduct as should deter others from trusting him. As chairman of a stockholders' investigating committee, organized for the purpose of protecting the rights and interests of the stockholders of the defendant corporation, plaintiff held an important position of trust and confidence that demanded of him the exercise of the utmost good faith. And yet, if the charges be true, he has grossly

violated that trust and treacherously betrayed the confidence of those whose interests it was his duty to protect. Such an implication of lack of integrity is unquestionably actionable *per se*. [5] A writing that charges another with violating a confidence that has been reposed in him or with treachery to his associates is actionable *per se*. (18 Am. & Eng. Ency. of Law, 2d ed., 912.)

In our opinion the complaint states a cause of action; and, as we see nothing in it that is ambiguous, uncertain, or unintelligible, we think it was not demurrable upon any of the grounds set forth in the special demurrer.

The judgment is reversed and cause remanded, with directions to overrule the demurrer.

Thomas, J., and Weller, J., concurred.

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[Civ. No. 3356. First Appellate District, Division Two.—May 22, 1920.]

**THE IMPERIAL DEVELOPMENT COMPANY (a Corporation), Appellant, v. THE CITY OF CALEXICO et al., Respondents.**

- [1] **TAXATION—COTTON IMPORTED FROM MEXICO—RETENTION AND STORAGE BY IMPORTER IN ORIGINAL BALES—NONLIABILITY FOR STATE AND LOCAL TAXES.**—Cotton and bollies in flat bales imported into the United States from the republic of Mexico are not subject to state or local taxation so long as they remain the property of the importer and are contained in the unbroken original form or bales in which they were imported, it being immaterial that the bales are stored in various places in a warehouse in which home-grown cotton is also stored, that they were imported duty free, and that the form in which they were imported is not suitable for long transportation, it being necessary to compress the bales into more compact form for that purpose before delivering the same to the railroad for transportation.
- [2] **ID.—ACTION TO TEST VALIDITY OF TAX LEVIED—SUBMISSION ON AGREED STATEMENT OF FACTS—RELIEF AUTHORIZED.**—Where an action to test the validity of a tax levied on such cotton and bollies is submitted on an agreed statement of facts which contains conflicting statements as to the status of the property, it being stated in one place that plaintiff demanded of defendants the delivery of

said property but that they refused, and now refuse, to deliver the same unless the tax is first paid, which plaintiff refused and refuses to do, and in another that the taxes were paid under protest, the trial court, under plaintiff's prayer for general relief, has power to do full justice between the parties in disposing of the litigation by directing a return of the property held, or of the money collected by the assessor, as the facts may warrant, and is not limited to granting plaintiff's specific prayer that the tax be declared invalid.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Reversed.

The facts are stated in the opinion of the court.

Louis Lamy for Appellant.

M. C. Atchison, City Attorney, and Alfred Blaisdell for Respondent.

J. W. Hocker, *Amicus Curiae*, for Respondent.

LANGDON, P. J.—This is an appeal by the plaintiff from a judgment against it in an action to have certain taxes assessed against its property declared void, and for general relief. The trial was had upon an agreed statement of facts as follows:

“That at all times mentioned or referred to in plaintiff's amended complaint herein, the plaintiff was, and now is, a corporation duly formed and existing under the laws of the Republic of Mexico, duly qualified and entitled to do business in the State of California, and having a branch office and place of business in the City of Calexico, in the County of Imperial and State of California.

“That the defendant City of Calexico is a municipal corporation of the Sixth Class in said state.

“That the defendant Paul B. Steintorf is, and at all times mentioned or referred to in said amended complaint was, the duly elected, qualified and acting Assessor of said City of Calexico.

“That the plaintiff at all said times and at noon of March 4th, 1918, was the owner of, in the possession and entitled to the possession at and in said City of Calexico, County and State aforesaid, of 349 bales of cotton, and 14 bales of bol-

lies; said cotton being of the value of to-wit \$53,000.00, and said bollies being of the value of, to-wit: \$2,000.00, at all the times mentioned or referred to in said amended complaint.

"That said cotton and bollies were owned and imported by plaintiff from said Republic of Mexico, and were duly entered through the port of Calexico aforesaid, after the payment by plaintiff of all the duties imposed by law; that said cotton and bollies were contained in unbroken original packages, to-wit: in flat bales as same came from the gin; and immediately after the entry of the same at said port, said merchandise was placed, for storage, in the Calexico Compress Company's yards at Calexico aforesaid, where it remained the property of plaintiff in the original forms and packages in which it was imported.

"That said cotton was not stored in any one place, or in one particular portion of said Compress Company's building or yards, but was scattered in different portions of said yards in different amounts in which it was brought in on different occasions. That although marked for identification, it was scattered here and there with the general mass of cotton stored in said yards; that said Calexico Compress Company had stored with it, and was storing thousands of bales of cotton owned by divers and many persons, much of which was produced in the United States; that plaintiff at different times since the said 4th day of March, 1918, and after payment by it under protest of the taxes levied and assessed against said cotton has sold and offered for sale portions of said cotton; that said cotton at the time of the assessment herein was not in transit, or in the possession of any railroad company for transit, but was being held indefinitely, subject to storage charges and sales; that there is no difference in the manner of storing and handling cotton of the plaintiff from the manner of storing and handling cotton of other producers storing cotton in said yards which last cotton has been raised and produced in the state of California.

"That said Calexico Compress Company is a public service corporation of the State of California, which offers, among other things, to the cotton growers, including this plaintiff, facilities for storing, compressing, exposing for sale, selling, transporting, shipping, and the general handling of cotton.

"That cotton as it comes from the gin in 'flat' bales is not in a suitable condition for shipping or transportation, except between points where the distances are very short, but before said cotton is shipped any long distance, it is the custom to compress said bales into a more compact form by the Calexico Compress Company, before delivering same to the railroad for transportation.

"That while said imported property was so owned and possessed by plaintiff as aforesaid, and in the condition stated in this stipulation, on to-wit: March 4th, 1918, the defendants levied an assessment and tax upon the same, of \$1.12 per bale for said cotton, and of ninety cents per bale for said bollies.

"That plaintiff demanded of defendants the delivery of said imported property, but defendants always refused to deliver the same, and now refuse unless the taxes so levied and assessed against said property, were and are first paid, which plaintiff refused and refuses to do."

[1] These facts, we think, make the present case closely analogous to the case of *Low v. Austin*, 13 Wall. 29, [20 L. Ed. 517]. This was a California case which was carried to the United States supreme court on a writ of error, the contention there being the same as the contention here, i. e., that goods imported from a foreign country are not subject to state taxation while remaining in the original packages, unbroken and unsold in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the state which is subject to an *ad valorem* tax.

In the present case, the respondent contends, as was done in the *Low* case, that the goods have become a part of the general property of the state and are subject to *ad valorem* taxes; that they are stored with goods grown in the United States, and therefore have become mingled with such goods and are subject to the same taxes, etc. Almost precisely the same arguments appear in the decision of the state court in the *Low* case, a considerable portion of which decision is set out in the opinion of the supreme court of the United States, at pages 30 and 31 thereof. But these contentions were held to be unsound by the highest court in the land. In said case of *Low v. Austin, supra*, the plaintiff had imported wines from France, which he had placed in his ware-

house at San Francisco in the original cases, and had offered them for sale. While in the warehouse the wines were assessed for state, city, and county taxes. Low refused to pay the tax and the collector levied upon the wines and was about to sell them, when Low paid the charges under protest, and brought an action to recover the amount so paid. The opinion of Mr. Justice Field in that case seems to us to answer all the contentions of the respondent here. It is based upon the well-known case of *Brown v. Maryland*, 12 Wheat. 419, [6 L. Ed. 678, see, also, Rose's U. S. Notes], and reasserts the doctrine of that case that goods imported do not lose their character as imports and become incorporated into the mass of property of the state until they have passed out of the hands of the importer, or until they have been removed by said importer from the original packages in which they were imported.

It is admitted by the stipulation as to facts that the goods were in their original bales. Respondents seek to distinguish flat bales from other varieties of bales, and urge upon our attention that flat bales are not a suitable arrangement for long transportation. This seems to us quite immaterial. The pertinent fact is that the goods were in the bales in which they were imported. When the importer seeks to convey the goods any considerable distance, he will be obliged to change the original packages, and then become liable to state taxes.

Respondents seek aid from the admitted fact that the cotton was not all stored in one portion of the warehouse, and that it was stored in a warehouse in which home-grown cotton was also stored, and, further, that it was assembled and stored at different dates. The relevancy of these matters is not apparent to us. If the rule would be applicable to 349 bales of cotton, considered as one lot, it would be applicable to one bale. Therefore, if each bale was stored in a different warehouse, or in a different part of the same warehouse, and if each bale had been brought to the warehouse at a different time, the principle would be none the less applicable, for it is admitted that the goods were marked for identification and were in the original bales. Under such circumstances it could not become so mingled with the other goods stored in the warehouse as to lose its character as an import while it continued to be the property of the



importer. In the case of *Low v. Austin*, *supra*, the state court assumed in its opinion that the imported wines might be stored with wines of home manufacture, which would be sold in the same kind of container, but the United States court held that, nevertheless, the goods, so long as contained in the original packages and remaining in the hands of the importer, were beyond the taxing power of the state. (See, also, *Brown v. Maryland*, *supra*; *Waring v. Mayor*, 8 Wall. 110, 122, [19 L. Ed. 342, see, also, Rose's U. S. Notes].)

The respondents ask us to take judicial notice that no duties were paid to the United States on the cotton, as it is one of the articles upon the "free list," and they argue that since no duties were exacted by the United States, the state has power to tax. We cannot agree with the respondents that this fact changes the principle involved. We have been cited to no case involving this particular point; but it would seem reasonable that if the permission of the United States to import articles into the country, granted upon the payment of a tax, means immunity from state taxation under certain conditions, that permission to import goods is equally as efficacious when it is given without the payment of a special tax or duty. The duties upon imported articles are fixed in larger or smaller amounts, or are removed entirely, according to the policy adopted by the government for the best interests of the country, and the fact that the policy may vary in the case of different articles and at different times, should not affect the principle applied to imported goods. We think goods are no less imported goods when the government permits them to be imported without exacting a duty for that privilege, than when the government imposes a heavy charge upon the privilege of importation.

[2] This disposes of the only question raised by the briefs which goes to the merits. The respondents interpose numerous technical objections. They argue that because the statement of facts shows that the plaintiffs paid the taxes under protest, that, therefore, the goods are no longer held by the collector, and the question of whether the tax is illegal or not has become a moot question in this action, and that the plaintiff must bring another action to recover its money. Plaintiff has asked for general relief. It is entitled to such relief as the facts shown at the trial will war-

rant. The court has power to do full justice between the parties in disposing of this litigation. The determination of the validity of the tax sought to be levied is but the determination of the foundation of plaintiff's relief. If the facts had shown that the tax had not been paid, the court should have declared the tax illegal and ordered a return of the cotton, or the portion of the cotton, if any, held by the assessor. The stipulation as to facts is not clear. It seems contradictory. It does not show whether all or part of the cotton is being held by the assessor, or whether it has all been released. At one place it is stipulated that "after payment by it under protest of the taxes levied and assessed against said cotton, plaintiff has sold, and offered for sale, portions of said cotton." In the last paragraph of the stipulation, the fact appears as follows: "That plaintiff demanded of defendants the delivery of said imported property, but defendants always refused to deliver the same, and now refuse unless the taxes so levied and assessed against said property were, and are first paid, which plaintiff refused and refuses to do."

Findings of fact were waived, and this stipulation as to facts takes the place of findings by the court, but because of its uncertainty in regard to this important matter, we are unable to tell whether judgment should be directed for a return of the property, or for a return of the tax collected. Plaintiff is entitled to some relief, but the record is not sufficiently definite to enable us to make anything but an alternative order.

Respondent objects to a consideration of the bill of exceptions containing this agreed statement of facts because the judgment was rendered and notice of entry given on August 30th, and the bill of exceptions was not tendered until October 2d. Appellant relied upon the pendency of its motion for a new trial to interrupt the running of the time allowed for presenting the bill of exceptions, and respondent contends that as the case was tried upon an agreed statement of facts, plaintiff was not entitled to a new trial, and therefore the pendency of its motion would not serve to extend the time for appeal. The record contains a stipulation of counsel that the "judgment-roll, notice of intention to move for a new trial, order denying motion for a new trial and plaintiff's bill of exceptions shall constitute the record on

appeal herein." No objection appears to have been made to the power of the trial court to hear and determine the motion for a new trial, or to settle the bill of exceptions. Under such circumstances we do not think respondent is in a position to urge the point here, even though it were meritorious. Furthermore, even though we take respondent's position and consider only the judgment-roll, we find that substantially all the facts set out in the stipulation of facts are admitted by the pleadings, and upon the judgment-roll alone, with these admissions in the pleadings, we should reach the same conclusion.

The judgment is reversed with instructions to the trial court to render judgment for the plaintiff declaring the tax illegal and void, and for a return of the property held, or of the money collected by the assessor, as the facts may warrant.

Nourse, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 3221. First Appellate District, Division Two.—May 22, 1920.]

**COMMERCIAL ACETYLENE SUPPLY COMPANY (a Corporation), Respondent, v. E. FOX, Appellant.**

- [1] **BAILMENTS — ENLARGEMENT OF BAILEE'S LIABILITY — AGREEMENT AND INTENTION OF PARTIES.**—A contract enlarging a bailee's liability must be specific and in clear and unambiguous language; and, while it will not be extended beyond the obvious scope of its terms, it must be given effect as showing the intention of the parties.
- [2] **ID.—LOAN OF GAS CYLINDERS — DESTRUCTION BY FIRE — LIABILITY FOR DAMAGE—AGREEMENT OF BAILEE.**—Where a contract, in the form of a letter from the seller of acetylene gas to the purchaser

and the acceptance by the latter, contains a provision that the purchaser is "responsible for any damages" to any of the cylinders containing such gas while in the purchaser's possession, and such cylinders are almost totally destroyed by fire while in the latter's possession, he is liable in damages therefor, notwithstanding there was no negligence on his part.

- [3] **ID.—RESPONSIBILITY FOR DAMAGE—CONSIDERATION.**—Where a seller of acetylene gas loans certain cylinders to a purchaser for a specified time without rent and the latter agrees to be responsible for any damage to the cylinders while they are in his possession, the bailment itself is a sufficient consideration for the obligation assumed by the purchaser.

**APPEAL** from a judgment of the Superior Court of Santa Clara County. P. F. Gosbey, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. M. Rosenthal for Appellant.

Adams & Adams for Respondent.

**NOURSE, J.**—Judgment in the sum of \$400 was rendered in favor of plaintiff and against defendant in this action, from which the latter appeals.

The action (which was tried on an agreed statement of facts) was for damage to four gas cylinders, of the value of \$440, owned by plaintiff, and which were almost totally destroyed by fire while in the possession of defendant, without negligence on his part. Their value, when subsequently returned to the plaintiff, was but forty dollars. The cylinders contained acetylene gas sold by plaintiff to defendant upon a contract in the form of a letter addressed by plaintiff to defendant and accepted by the latter. It provided as follows:

"We acknowledge, with thanks, your order for one tank of acetylene, which we are shipping today via Southern Pacific freight. This cylinder is the property of this company and valued at \$110. It is merely loaned you while you are using the gas contained therein. Refilling of same, except by us, or the reloading of any cylinder without our written consent is prohibited. When empty they are to be returned to us at West Berkeley, via Southern Pacific freight, charges prepaid. You are also responsible for any

damages to any of our cylinders while they are in your possession or care, and we hold you responsible for same until they are received back at our plant. Any cylinders lost in transit to us are to be traced by you until located and if this cannot be done, you are to enter claim with railroad or express company for the value of the cylinders. We require this as our gas is sold f. o. b. West Berkeley, Cal. We reserve the right to charge rental on cylinders retained by you in excess of thirty days. The above is equally applicable to future orders for acetylene except that should you at any time receive different size cylinders the value of same will vary accordingly. Kindly sign and return duplicate of this agreement, sent you herewith.

"Yours very truly,

"COMMERCIAL ACETYLENE WELDING Co.

"(Signed) A. R. CHANDLER.

"Accepted.

"(Signed) MARKOVITS & Fox.

"E. Fox. (Customer)"

The determination of this action resolves itself into a proper interpretation of the foregoing agreement. It is conceded that a bailee may by a special contract assume the liability of an insurer. The question here is whether this agreement met the requirements necessary for such a contract so as to make the bailee liable for damages occurring without his negligence.

Appellant argues that it enlarged his liability only in that it increased the degree of care to be exercised by him; that otherwise it merely expressed what the law would have implied in the absence of an agreement, and that, therefore, with the exception mentioned, his liability was the same—that is, the damage having occurred without negligence on his part, he was not liable.

[1] A contract enlarging a bailee's liability must be specific and in clear and unambiguous language; and while it will not be extended beyond the obvious scope of its terms, it must be given effect as showing the intention of the parties. [2] The provision: "You are responsible for any damages to any of our cylinders while they are in your possession or care" determines the nature of the contract and fixes appellant's ability. As the obligation to be responsible for *any* damages is not one which the law would

have implied—the law implying responsibility only for damage due to a bailee's negligence (*Commercial Elec. Sup. Co. v. Missouri Com. Co.*, 166 Mo. App. 332, [148 S. W. 995, 997])—it must be presumed that the purpose of including this clause in the agreement was to protect respondent from loss occurring under just such circumstances. It does not appear that the provision for tracing and making claim against the railroad company for lost cylinders is, when taken in connection with the entire agreement, sufficient indication of a contrary intention to nullify the effect of the definite agreement to be responsible for any damages while in appellant's possession. This provision is easily distinguishable from the provision of the contract in *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, [67 C. C. A. 265], cited by appellant, holding that an agreement to be "responsible" for coal after delivery was not a contract of insurance.

[3] There is no merit in the point urged by appellant that there was no consideration to support this obligation. The bailment itself is a sufficient consideration for such an obligation. (*Commercial Elec. Sup. Co. v. Missouri Com. Co.*, *supra*.) In addition to that, in this instance, the bailee was given the use of the cylinders for one month without rent.

For the foregoing reasons the judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

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[Civ. No. 3311. Second Appellate District, Division One.—May 22, 1920.]

P. F. PIDGEON, Appellant, v. SAN DIEGO CONSOLIDATED BREWING COMPANY (a Corporation), Respondent.

[1] CORPORATIONS—BREACH OF CONTRACT—STOCKHOLDER'S LIABILITY—STATUTE OF LIMITATIONS.—The statute of limitations begins to run in favor of the stockholder of a corporation on his stockholder's liability for a breach of contract by the corporation from the date of the contract and not from the time of its breach.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. J. Mossholder for Appellant.

Eugene Daney and Lane D. Webber for Respondent.

CONREY, P. J.—Appeal by the plaintiff from a judgment entered in favor of the defendant in an action to recover from the defendant, on its statutory liability as a stockholder of the Mission Brewing Company, a corporation, a fixed proportion of an alleged indebtedness of the Mission Brewing Company to the plaintiff. The judgment was entered pursuant to an order sustaining the defendant's demurrer to the complaint without leave to amend the complaint. One of the grounds of demurrer was that the action is barred by the provisions of section 359 of the Code of Civil Procedure.

The complaint was filed on the seventeenth day of September, 1918. The complaint sets forth the terms of a contract entered into on the eleventh day of August, 1913, between plaintiff and the Mission Brewing Company under which, at a stated price per barrel, the company agreed to sell and deliver beer to the plaintiff as ordered. The complaint alleged, in effect, that said contract was in force at all times from the making thereof to and including the sixth day of July, 1918, at which time the Mission Brewing Company refused to further perform the contract and notified the plaintiff that it would not thereafter deliver beer to him, except at a stated price per barrel, which was very much higher than the price fixed by the contract. Further allegations show loss and damage to the plaintiff by the refusal of the Mission Brewing Company to comply with the terms of said agreement.

[1] The question presented by this appeal has been fully discussed and should be regarded as having been permanently settled by recent decisions of the supreme court. The rule is thereby established that in cases of this kind a stockholder's liability is an obligation created by law, which is barred at the expiration of three years from the time when

the liability was created; that the words referring to the time "when the liability was created," as set forth in section 359 of the Code of Civil Procedure, apply to the time when the corporation made the contract out of which the liability arises, and not to the time of any breach of the contract by the corporation. For a full statement of the law on this subject it is only necessary to refer to such late cases as *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, [153 Pac. 939], and *Chambers v. Farnham*, 182 Cal. 191, [187 Pac. 732]. We think there is no merit in appellant's contention that under the contract set out in the complaint no liability was created (within the meaning of the code section above cited) against the Mission Brewing Company "until Pidgeon placed an order for beer. Each time he placed an order for beer a new liability arose." It is now too clear for further argument that if the Mission Brewing Company was ever liable to the plaintiff by reason of the transactions mentioned in the complaint, that liability must have arisen out of the contract of August 11, 1913. This being so, the statute limiting the time for the commencement of an action against a stockholder for a breach of that contract began to run in favor of the stockholder at the date of the contract.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

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[Crim. No. 906. First Appellate District, Division Two.—May 22, 1920.]

In the Matter of the Application of HORACE W. PHILBROOK for a Writ of Habeas Corpus.

- [1] HABEAS CORPUS—ERROR IN EXERCISE OF JURISDICTION.—On *habeas corpus* error in the exercise of jurisdiction cannot be considered.
- [2] ID.—COMMITMENT OF ADMINISTRATOR—REFUSAL TO RENDER FINAL ACCOUNT—JURISDICTION—PRESUMPTION.—In the absence of a showing on *habeas corpus* of any facts concerning the contents of the answer filed by the administrator of an estate to the original petition in a proceeding instituted under section 1639 of the Code of Civil Procedure to compel him to render a final account of his



intestate's administration of a given estate, it must be presumed that the court's order that he be arrested on the ground that he had refused to obey the citation, though made in his absence and without notice, after the filing of such answer, was in the lawful and proper exercise of the judicial function.

- [3] **ESTATES OF DECEASED PERSONS—DEATH OF ADMINISTRATRIX—FINAL ACCOUNT—FAILURE TO FILE CLAIM—JURISDICTION.**—The jurisdiction of the court to compel an administrator to render a final account of his intestate's administration of a given estate is not lost by the failure of the successor of such intestate in the administration of such estate to present a claim against the estate of the deceased administratrix.
- [4] **ID.—REVOCATION OF LETTERS PRIOR TO DEATH—FINAL ACCOUNT BY PERSONAL REPRESENTATIVE—JURISDICTION.**—The fact that the letters of administration of such deceased administratrix were revoked before her death did not deprive the court of jurisdiction, in a proceeding under section 1639 of the Code of Civil Procedure, to require her personal representative to render the final account which she had not rendered.

**PROCEEDING on Habeas Corpus to secure the release of an administrator adjudged guilty of contempt of court in refusing to render a final account. Writ discharged and prisoner remanded.**

The facts are stated in the opinion of the court.

Horace W. Philbrook, *in pro. per.*, for Petitioner.

Ezra W. Decoto, District Attorney, and Fitzgerald, Abbott & Beardsley for Respondent.

LANGDON, P. J.—A writ of *habeas corpus* was granted by Mr. Justice Lawlor of the supreme court returnable to this court, the petitioner claiming that he was restrained of his liberty under an order of the superior court in Alameda County adjudging him guilty of contempt upon his refusal to account as the administrator of the estate of his deceased wife, Florence E. Philbrook, who had formerly been the administratrix with the will annexed of the estate of Humphrey A. Randall, ancillary administration of whose estate is pending in the superior court, the main estate having been administered or being in the course of administration in the state of Maine at the place of death of Randall.

In 1917 the letters of Florence E. Philbrook were revoked, and she was succeeded in her administration by Anne Bates Randall, the widow of Humphrey A. Randall. During her administration Mrs. Philbrook filed her first account but did not file the final account of her administration. She died in November, 1918, and the petitioner herein was appointed and now is the administrator of her estate.

In December, 1919, Anne Bates Randall, the executrix of the Randall will, instituted proceedings under section 1639 of the Code of Civil Procedure to compel the administrator of the estate of Florence E. Philbrook to render a final account of his intestate's administration of the Randall estate. He was cited to account, and his motion to dismiss the petition of the executrix and to quash the order of the court directing the issuance of the citation and the citation itself was denied. His demurrer to the petition for the citation was overruled, and he was granted leave to answer. The citation to account was continued from time to time until February 24, 1920. The court thereupon ordered the writ of attachment to issue and Mr. Philbrook was arrested and brought into court on March 12, 1920. Upon his promise that he would appear in open court on March 22, 1920, and file a final account he was released upon his own recognizance. He failed to appear on March 22d and failed to file any final account. New attachment proceedings were instituted; Mr. Philbrook was again brought into court and directed to file his final account pursuant to the court's order, and upon his refusal so to do he was committed to the county jail until he should comply with the court's order.

The petitioner in his lengthy briefs set forth a great number of grounds to show that the commitment was without warrant of law.

[1] It is fundamental that on *habeas corpus* error in the exercise of jurisdiction cannot be considered. (*Ex parte Perkins*, 18 Cal. 60; *Ex parte Gibson*, 31 Cal. 619, [91 Am. Dec. 546]; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Cottrell*, 59 Cal. 421; *Ex parte Sternes*, 77 Cal. 156, [11 Am. St. Rep. 251, 19 Pac. 275]; *Ex parte Ah Men*, 77 Cal. 198, [11 Am. St. Rep. 263, 19 Pac. 380]; *Ex parte Joutsen*, 154 Cal. 540, [98 Pac. 391]; *Matter of the Application of La Duc*, 161 Cal. 663, [120 Pac. 13].) While the writ was issued during

the time the petitioner was under arrest under a writ of attachment, when it was served and he was released, he was in custody not under the attachment but under a warrant of commitment. The return, however, shows that the order for the warrant of commitment and the warrant of commitment were but further steps in the same proceedings and upon the same facts as the arrest under the attachment under which the writ of *habeas corpus* was issued.

The superior court has power to punish for contempt. (Code Civ. Proc., sec. 1209.) The warrant of commitment recites that the petitioner in the immediate view, presence, and hearing of the court and while the court was in session refused to obey the "order of the court that he render the said final account," and that the court at the same time by its order adjudged and declared the petitioner "had been guilty of a contempt of said court by his refusal to obey the said order of said court that he render said final account," so that the commitment must be sustained, if at all, under subdivision 5 of section 1209 of the Code of Civil Procedure, as to disobedience of a lawful judgment, order, or process of the court.

The particular contentions of the petitioner are three: (1) That the court was without general jurisdiction to require him to account as the administrator of his deceased wife's estate; (2) that if it ever had such jurisdiction, the right of Mrs. Randall to invoke it had been lost by her failure to present a claim against Mrs. Philbrook's estate and the lapse of time; and (3) that upon his answer to the citation the court was not empowered to make the order for the disobedience of which the commitment was made. These contentions will be considered in their inverse order.

[2] If the court had jurisdiction of the proceeding and the right of the executrix of the Randall will had not been lost, there could be no question in regard to the propriety of the commitment. The original citation addressed to the petitioner was dated December 12, 1919. From the petition for the writ of *habeas corpus* it appears that the present petitioner appeared specially on December 30, 1919, and moved the court to dismiss the petition, and on January 9, 1920, he filed a demurrer to the original petition, which demurrer was overruled on January 20, 1920, time being granted to the petitioner here to answer, which was extended

by successive orders until February 24, 1920, at which time the present petitioner filed his answer to the petition. The petitioner does not in any way set forth the nature of his answer, nor does he state that in the answer there was any attempt on his part either to render the account he was ordered to render or facts or circumstances shown to explain why the account was not rendered.

It is then alleged that on February 26, 1920, in his absence and without notice the superior court ordered the petitioner to be arrested on the ground that he had refused to obey the citation. The allegations of fact are interspersed with statements such as that the order was made "upon the utterly false and insolently impertinent ground that I have refused to obey the said citation." Such statements add nothing to the fact that the order of February 26, 1920, was made. In the absence of a showing of any facts concerning the contents of the answer filed by the petitioner, it must be presumed that the order of February 26th was in the lawful and proper exercise of the judicial function. (Code Civ. Proc., sec. 1963, subds. 15, 16; *People v. Blackwell*, 27 Cal. 67.)

Attachment was issued on February 26, 1920, and the petitioner was arrested under the attachment and brought before the court on March 12, 1920. It appears from the copy of the order made on the last-mentioned day that it was ordered that Mr. Philbrook render and file the final account of the sums of money and other property of the Randall estate for which Florence E. Philbrook, deceased, as such administratrix, was chargeable and accountable to said estate. The order recites that "upon the stipulation and promise of the said Horace W. Philbrook, the said administrator appearing *in propria personam*, and upon the stipulation and promise of the said Lloyd M. Robbins, Esq., his said attorney, made in open court, that the said Horace W. Philbrook will, upon the twenty-second day of March, 1920, at 2 o'clock P. M. of said day, personally file said final account in open court, in Department Four, by delivering the same to the clerk thereof, and the said Lloyd M. Robbins, Esq., his said attorney then and there waiving any irregularities growing out of said continuance and at the request of the said Horace W. Philbrook, said administrator, and of his said attorney said Lloyd M. Robbins,

Esq.," it was ordered that the petitioner here be released on his own recognizance until March 22, 1920, at which time he was ordered to appear before the court to render and file the final account. It is contended by the petitioner here that the promise which he admits was made under the conditions stated was made under duress, because he claims he was illegally under arrest. The claimed illegality of that arrest will be considered under the other two contentions of the petitioner. He did not appear on March 22d in accordance with his promise and did not render the account he was then ordered to render. The attachment under which the petitioner was arrested for disobedience of the order of March 12, 1920, was issued on March 26, 1920, and the petitioner was arrested. The writ of *habeas corpus* was issued on March 24, 1920. The petitioner was arrested on that day and was taken before the court and the order of commitment was made. The entire record shows ample ground for the issuance of the attachment and the commitment if the petitioner's contentions in regard to the two jurisdictional questions are not well taken.

[3] The petitioner alleges that Florence E. Philbrook died on November 17, 1918, and that the petitioner was duly appointed administrator of her estate and qualified as such administrator on January 9, 1919. There is no allegation that he ever published notice to creditors in said estate, but it is argued that it must be presumed that he did what he should have done, and, therefore, that the time for presentation of a claim on the part of the estate of Randall must have expired between the time of his qualification as administrator of the estate of Florence E. Philbrook and the issuance of the citation on December 12, 1919. It is a fundamental rule of law that every essential fact must be stated in a pleading and this is true even in a *habeas corpus* proceeding. The allegations of the petition cannot be strengthened by this contention in opposition to the general presumption attaching to the regularity of judgments and orders of courts. Even though it appeared that notice to creditors had been given in all respects as required by law in the estate of Philbrook, the petitioner would be in no better position on this branch of the case. He relies on *In re Smith*, 108 Cal. 115, [40 Pac. 1037], to support his proposition that if the time for presentation of claims expired without a claim having been presented on the part of

the Randall estate, it is barred forever. Without making lengthy analysis of the opinion in *In re Smith*, it is sufficient to show that it does not sustain the petitioner's contention. In that opinion it was said that it was the duty of the surviving executor "to have presented a claim in his brother's estate, or to have compelled an accounting of his brother's trust in equity." (*In re Smith*, 108 Cal. 121, [40 Pac. 1039].) At that time section 1639 of the Code of Civil Procedure had not been adopted, but as was determined in *King v. Chase*, 159 Cal. 420, [115 Pac. 207], proceedings under that section take the place of the suit for accounting in equity. Under the decision in *In re Smith*, the executrix of the will in the Randall estate had open to her alternative remedies, and she is pursuing one of those remedies. Furthermore, the present proceeding in this court is not in the nature of an appeal or writ of error, but the investigation is confined solely to the question of jurisdiction.

[4] The principal contention of the petitioner is that because the letters of administration originally granted to Mrs. Philbrook in the estate of Randall were revoked before her death, there is no jurisdiction in the superior court in the estate of Randall to require the personal representative of Mrs. Philbrook to account. Prior to 1905, the statutes of this state contained no provision authorizing the superior court sitting in probate to require or settle accounts. (*King v. Chase, supra.*) Under that case, the sole method of requiring such an account is under the provisions of section 1639 of the Code of Civil Procedure. It provides that if any executor, administrator, or guardian dies, upon petition of the successor of such deceased executor, administrator, or guardian, the court may compel the personal representative of the deceased executor, administrator, or guardian to render an account of the administration of their testator or intestate and must settle such account as in other cases. Section 1629 of the Code of Civil Procedure provides that where the authority of the executor or administrator ceases or is revoked for any reason, he may be cited to account. After the revocation of the letters of Mrs. Philbrook, proceedings were instituted to require her to file her final account. These proceedings terminated by her death. The present proceedings are under section 1639 of the Code of Civil Procedure. The contention of the petitioner is that

he is not the personal representative of a deceased administrator, for the reason that Mrs. Philbrook had ceased to be the administratrix of the estate of Randall prior to her death. While her letters had been revoked in her lifetime, and she had no further authority to act as administratrix, she had not rendered her final account and had not been discharged as administratrix. The liability of Mrs. Philbrook was her liability as administratrix. It appears to this court that to construe section 1639 of the Code of Civil Procedure in accordance with the petitioner's contentions would be extremely narrow, and the facts of this case as disclosed by the record support the construction placed upon the section by the superior court of Alameda County.

The multiplicity of other contentions made by the petitioner do not appear to require mention. They have been examined, and, in the opinion of the court, none of them warrants the release of the petitioner on this proceeding.

It is ordered that the writ be discharged and the petitioner remanded to the custody of the sheriff of Alameda County.

Brittain, J., and Nourse, J., concurred.

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[Civ. No. 2935. Second Appellate District, Division One.—May 22, 1920.]

WRIGHT-CALLENDER-ANDREWS COMPANY (a Corporation, Respondent, v. MARIE S. EATON, Appellant.

- [1] CONTRACTS—AUTHORITY TO SELL PROPERTY—INCLUSION OF AUTOMOBILE—PAROL TESTIMONY.—In this action for services rendered in procuring a purchaser of certain real and personal property pursuant to the terms of a written contract executed by the defendant, which sale was not consummated because of the refusal of defendant to transfer to the prospective purchaser an automobile owned by her, the trial court committed error in permitting the introduction of parol testimony that plaintiff was authorized to include such automobile in the sale of the property, the contract having described the property "as is completely furnished," except-

ing certain articles of personal property, but made no mention of the automobile.

- [2] **ID.—AGREEMENTS IN WRITING—PRESUMPTION—PAROL EVIDENCE INADMISSIBLE.**—Where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the whole agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evidence cannot be admitted for the purpose of adding other terms or items thereto.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Dana R. Weller, Judge. **Reversed.**

The facts are stated in the opinion of the court.

William Ellis Lady for Appellant.

Leonard B. Slosson and Slosson & Mitchell for Respondent.

**SHAW, J.**—In this action the trial court gave plaintiff judgment for services rendered in procuring a purchaser of certain real and personal property pursuant to the terms of a written contract executed by defendant, who appeals from the judgment.

[1] The property is described in the contract as "3828 Wilshire Boulevard (city of Los Angeles), being lot 20 Western Wilshire Heights Tract. Property as is completely furnished except piano player, music, cuckoo clock, sewing machine and (picture) boat. Old silver, family pictures, pier glass and books." Within the time fixed therefor in said contract, plaintiff, claiming to have acted in pursuance of authority conferred thereby, and representing to him that the personal property included an automobile owned by defendant, presented a party ready, able, and willing to purchase the property, if the automobile was included, at the price specified. Defendant refused to transfer the automobile, by reason of which fact the proposed sale was not consummated. The question is, whether the contract covered the automobile. The error of the court upon which appellant argues for a reversal, occurred in the trial of this issue, as to which the court found adversely to defendant.

No mention of the automobile is made in the contract. Nevertheless, counsel for respondent argue that, since the



property was located in the "fashionable Wilshire residence district," an automobile might very well be deemed a part of the furnishing of "property completely furnished." With equal propriety, as said by counsel for appellant, they might insist that an aeroplane or pair of horses and carriage should be deemed a part thereof. We cannot believe the trial judge in making the findings was influenced in so doing by such argument; but that, deeming the case a proper one therefor, the court, over defendant's objection, and not for the purpose of reforming the contract, permitted the introduction of parol testimony, upon which, since the contract by its terms did not include the automobile, it is clear the court based its decision. In so doing we think it erred. Section 1856 of the Code of Civil Procedure provides that, "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings." As stated, no such question is in issue here. This section further provides that, in ascertaining the proper construction of an instrument, other evidence as to the circumstances under which it was made may be received for the purpose of placing the judge in the position of those whose language he is to interpret; and further provides that where the contract is of doubtful meaning, or it is necessary to explain an extrinsic ambiguity, other evidence may be received.

To our minds, the terms of the contract are perfectly clear, and it should be construed in accordance with the plain import of the language used therein. No reason was presented for the reception of parol evidence other than to add thereto terms which it did not, as written, include; and, as provided by section 1858 of the Code of Civil Procedure, when construing contracts of such character, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted." Including the automobile was clearly doing that which the judge is prohibited from doing by the provisions of the statute. Upon like evidence, since a written

contract, however carefully drawn, would afford a party no protection, he could be completely divested of his substance. Authorities in support of the proposition would seem unnecessary. [2] Suffice it to say that where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the whole agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evidence cannot be admitted for the purpose of adding other terms or items thereto. (*Thompson v. Libby*, 34 Minn. 374, [26 N. W. 1]; *Greenleaf on Evidence*, sec. 275; *Harrison v. McCormick*, 89 Cal. 327, [23 Am. St. Rep. 469, 26 Pac. 830].) In our opinion, the court erred in admitting parol evidence upon which it based the finding that, under the terms of the contract, plaintiff was authorized to include in the sale of the property described in the contract the automobile, which was not specified therein.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[Civ. No. 8809. Second Appellate District, Division One.—May 22, 1920.]

AMELIA GLOS, Appellant, v. J. A. McBRIDE, Respondent.

[1] **LEASES—IMMORAL CONSIDERATION—LOCUS PENITENTIAE ACCORDED LESSOR—RELIEF.**—While the law will afford a woman, the owner of land in fee and in possession, no redress for the use of such land by a man under a lease, the consideration for which was in part that they (though not husband and wife) should live together thereon and should cohabit as man and wife, it will, as to the unexpired portion of the term of such lease, upon a showing

by her of repentance, abandonment, and discontinuance of the shameful relation, grant her redress by quieting her title to the land as against such lease.

APPEAL from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge. Reversed.

The facts are stated in the opinion of the court.

B. F. Thomas for Appellant.

Benjamin P. Oakford for Respondent.

SHAW, J.—Action to quiet title. In addition to an allegation that plaintiff is owner of the land in fee simple and in possession thereof, it is alleged in the complaint that defendant, basing his right thereto upon a lease thereof made by plaintiff to defendant, the consideration of which “was in part that said plaintiff and said defendant (though not husband and wife) should live together on said parcel of land and should cohabit as man and wife,” unjustly and without right claims an interest in the land adverse to plaintiff; followed by the usual prayer for relief. To this complaint the court sustained a general demurrer without leave to amend, and gave judgment for defendant, from which plaintiff appeals.

The ground of this ruling, as stated by the trial court, is that section 1608 of the Civil Code provides that “if any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void”; and that, since it appeared from the complaint that a part of the consideration for the lease was unlawful, its existence did not cast a cloud upon plaintiff’s title. Conceding that no cloud is cast upon a plaintiff’s title to land by an instrument which on its face discloses that it is void, we cannot in this case, since the lease is not exhibited by the record, assume the existence of such fact. On the contrary, upon the allegations of the complaint, the presumption is that on its face nothing appears affecting the validity of the instrument. It is the extrinsic facts alleged which render the lease void.

The chief ground upon which counsel for respondent insists upon the correctness of the ruling is that, as shown by

the complaint, the contract had for its object the creation and continuance during the term of the lease of an illicit relation between plaintiff and defendant, thus exhibiting her own turpitude, which constituted the consideration for the transfer of the leasehold. In other words, the complaint presents a case where the doors of the court are, as to both parties to the contract, closed; it will neither aid the one in the enforcement of the contract nor give aid to the other in avoiding it. (*Abbe v. Marr*, 14 Cal. 210; *Schmitt v. Gibson*, 12 Cal. App. 407, [107 Pac. 571].) While, as to executed contracts of such nature, this is a rule of almost universal application, it is equally true that as to like contracts, which are unexecuted, the law recognizes what is termed a *locus penitentiae* accorded to a plaintiff, which, as applied to the facts here presented, is an opportunity to repudiate the agreement and refuse to be a party to the acts contemplated thereby. (Bouvier's Law Dictionary.) Thus, it is generally held that a party to a wager, where the money is deposited with a stakeholder, may at any time before the event is determined repudiate the wager and demand the return of his money. (*Falkenburg v. Allen*, 18 Okl. 210, [10 L. R. A. (N. S.) 494, 90 Pac. 415]; *Johnston v. Russell*, 37 Cal. 670; *Gridley v. Dorn*, 57 Cal. 79, [40 Am. Rep. 110]; *Wright v. Stewart*, 130 Fed. 905.)

[1] Plaintiff, no doubt, intended to enter into the immoral relation and continue therein for the duration of the term of the lease, but persons may not be punished, either criminally or civilly, for wrongful intentions. It is the consummation of such intentions that subjects them to the effects of the law. As to whether plaintiff and defendant lived together or cohabited as man and wife in accordance with the agreement made is not disclosed by the complaint, and since the doing so would be *contra bonos mores*, we cannot, in the absence of allegation to that effect, assume they did. Indeed, the presumption is to the contrary. Conceding, however, that she did enter upon the life with defendant, as contemplated in the agreement, we do not think it can be said her day of repentance was past. The contract contemplated a continuing immoral relation, which, in our opinion, even though entered upon, plaintiff in the *locus penitentiae* accorded to her, might at any time repudiate and discontinue; and while the law would afford her no

relief for the use of the leasehold estate covering the expired portion thereof, it should, as to the unexpired term thereof, and upon a showing of repentance, abandonment, and discontinuance of the shameful relation, grant her redress. In our opinion, the court erred in sustaining the demurrer.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent, and Olney, J., who did not vote.

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[Civ. No. 2839. Second Appellate District, Division One.—May 12, 1920.]

N. L. LINELL, Appellant, v. J. A. GORDON, Respondent.

- [1] ACCOUNT STATED—STATEMENT OF BALANCE DUE—PROMISE TO PAY—CONSTRUCTION OF WRITING.—In this action to recover money alleged to be due on an account stated, a statement of account mailed by defendant to plaintiff showing the result of certain financial transaction in which plaintiff and defendant were jointly interested, which account closed with a statement of a balance due plaintiff, considered in connection with defendant's accompanying statement as to when he would pay the same, and his subsequent statements, constituted an account stated.
- [2] ID.—PROMISE TO PAY WITH INTEREST—IMPLICATION.—A promise by one person to pay another "with interest" implies a debt due from the former to the latter.

APPEAL from a judgment of the Superior Court of Riverside County. Hugh H. Craig, Judge. Reversed.

The facts are stated in the opinion of the court.

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1. Accounts stated, notes, 62 Am. Dec. 85; 136 Am. St. Rep. 37.

Andrew Johnston and Walter C. Davison for Appellant.

Thomas C. Yager for Respondent.

CONREY, P. J.—Action to recover money due on an account stated. From the judgment entered in favor of the defendant the plaintiff appeals.

The only controversy which we shall find it necessary to determine arises upon appellant's contention that the evidence is insufficient to justify the finding of the court that there was not an account stated and that the defendant did not agree to pay the balance shown by the alleged statement of account. [1] Under date May 5, 1914, the defendant sent to plaintiff by mail a statement of account showing the result of certain financial transactions in which the plaintiff and the defendant were jointly interested, which statement of account closed as follows: "May 5th/14 By Balance due L. Linnell \$1009.65." The statement was accompanied by a letter in which the defendant informed the plaintiff that defendant had traded forty acres of land of the plaintiff, together with other land of the defendant, and had received a trust deed for \$21,000 secured on an alfalfa ranch near Riverside; that plaintiff's land had been put in at \$4,000 and defendant had paid a commission of five per cent. The letter closes as follows: "The trust deed is drawing 7% interest and no taxes and the first payment will be Dec. 1st/14 when you will get your money and 7% interest on it. I am very sorry that I could not get cash for this but this is the very best offer that I have had since I saw you and I hope this will meet with your approval. I have some notes due in Aug. and if I get the money on them I will pay you off. There will be some more small charges for Certificate of Title and escrow charges." Plaintiff replied to that letter under date July 12, 1914, wherein he acknowledged receipt of defendant's letter, and said: "I am very glad that you succeeded in disposing of the land at Thermal Heights."

The defendant, in his answer, denied that he rendered to the plaintiff an account stated, and denied that by said account stated there was any amount found due to the plaintiff from the defendant. To the contrary, defendant alleged that on or about February 14, 1913, they entered into a contract in writing, set out as exhibit "A" of the answer. This

contract, over plaintiff's objection, was received in evidence. It shows that the defendant advanced a sum of money to secure the redemption of plaintiff's forty acres of land, and the plaintiff conveyed the land to the defendant; that the defendant thereupon agreed "that when said property shall be sold and that at the time of such sale and out of the proceeds of which second party shall receive" certain specified moneys advanced by him, "then the balance of the proceeds shall be divided equally between both parties hereto." The account rendered in May, 1914, represents the outcome of that transaction down to that date. Respondent contends that the evidence shows, not an account stated, but only an agreement under which appellant was not to receive any moneys from the defendant except out of the proceeds of the sale of the plaintiff's property. It should be conceded that if the property had been sold for money only, as contemplated by the agreement of February 14, 1913, the defendant would have been bound to pay to plaintiff only plaintiff's share of the net proceeds of such sale. It appears, however, that, acting upon his own responsibility, he disposed of plaintiff's land in connection with the trade which he made for the trust deed. His statement to the plaintiff and the report which he made, that "I have some notes due in Aug. and if I get the money on them I will pay you off," are inconsistent with his present theory that, having traded for the trust deed, he was to pay the plaintiff only out of the cash proceeds of the sale of plaintiff's land. In making this statement, together with his statement of account showing "balance due" from himself to Linell on May 5, 1914, he offered a statement of account which, when accepted by the plaintiff, as it unqualifiedly was accepted, constituted an account stated. The money was then due, but the defendant explained that he was not prepared to pay at that time.

Our conclusion that this was an account stated on which the specified amount then became due is confirmed by the subsequent conduct of the defendant. Under date of September 20, 1915, the defendant wrote to the plaintiff a further statement of the situation. Here he states for the first time that the land covered by the \$21,000 trust deed was subject to a first mortgage of \$15,000. He then states that the owner of the land failed to pay the interest on the first

mortgage; that defendant had been required to pay the interest, together with taxes and other expenses on the land; that "I finally had to foreclose on the trust deed and that cost me \$438, and now that I have a title to it I am trying to sell or trade it, but times are so hard that I have not much hopes of doing either. You can rest assured that as soon as I get any money out of the property that I will pay you with interest, but it is impossible for me to do anything now." [2] The promise to pay plaintiff "with interest" implies a debt due; for if defendant was to pay only out of cash proceeds of the sale of plaintiff's land, he would not be chargeable with interest until such cash proceeds had been received. Moreover, defendant's admission that he foreclosed on the trust deed and obtained title to the land secured thereby places him in the same position as if, on foreclosure of such trust deed, the land had been purchased by some third person and the purchase price paid over to the defendant. From the foregoing summary of the evidence we conclude that the evidence is insufficient to support the court's finding that there was not an account stated and that the defendant had not agreed to pay the balance shown thereby.

The judgment is reversed.

Shaw, J., and James, J., concurred.

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[Civ. No. 2147. Third Appellate District.—May 22, 1920.]

HELGA PETERSON, Respondent, v. CHRIST RASMUSSEN et al., Defendants; MRS. C. (BOLINE) RASMUSSEN, Appellant.

[1] **LIBEL — ACTION FOR DAMAGES — LETTER CONCERNING PLAINTIFF — FINDING—EVIDENCE.**—In this action for damages for an alleged libel on plaintiff, committed by means of a letter written in the Danish language and delivered to and read by the addressees, close friends of plaintiff, the finding of the trial court that the letter was written of and concerning plaintiff was fully sustained by the evidence.

[2] **ID.—IDENTITY OF PARTY—USE OF NAME UNNECESSARY.**—To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him.



- [3] **ID.—IMPUTATION OF WANT OF CHASTITY—DAMAGE—PRESUMPTION.** Words imputing to a woman a want of chastity are actionable *per se*, and damage to her reputation are presumed to result from the publication thereof.
- [4] **ID.—PRIVILEGED COMMUNICATION—WHAT CONSTITUTES.**—A privileged communication is one made without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.
- [5] **ID.—BURDEN OF PROVING PRIVILEGE.**—In an action for damages for an alleged libel, the burden of proving the privilege as set up in the answer is upon the defendant.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge. Affirmed.

The facts are stated in the opinion of the court.

P. H. Johnson and Irving D. Gibson for Appellant.

Martin I. Welsh for Respondent.

NICOL, P. J., *pro tem.*—This is an action for damages for an alleged libel on plaintiff, committed by means of a letter written by appellant Mrs. C. (Boline) Rasmussen in the Danish language. It is not disputed that the said appellant wrote the letter and that it was delivered to and read by the addressees, a certain Mr. and Mrs. Simonsen, in Sacramento.

Briefly, the complaint alleges that plaintiff is an unmarried woman of twenty-four years of age; that the defendants are husband and wife, residing together as such near Loomis, in Placer County; that on the seventh day of March, 1917, the plaintiff and defendants knew each other personally and on said day, and for a long time prior thereto, the plaintiff and Mr. and Mrs. Simonsen (the addressees of the letter) were close friends; that at all times prior to the publication of the defamatory statements contained in the letter herein—

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3. Libel and slander in charging woman with unchastity, notes, 15 *Ann. Cas.* 1242; 24 *L. E. A. (N. S.)* 577; 48 *L. E. A. (N. S.)* 615.

4. What libelous statements are privileged, notes, 2 *Am. Dec.* 431; 15 *Am. Dec.* 232; 31 *Am. Rep.* 708; 104 *Am. St. Rep.* 110.

after set forth plaintiff had always maintained a good name and reputation among her neighbors, acquaintances, and friends for virtue, politeness, moral worth, and integrity, and had never been suspected of being unchaste and without virtue.

That on the seventh day of March, 1917, the defendant Mrs. C. Rasmussen wrote of and concerning plaintiff a letter in the Danish language to Mr. and Mrs. Simonsen, in Sacramento; that by said letter the said defendant published of and concerning plaintiff a false, unprivileged, and malicious writing which, translated from the Danish into the English language, is as follows:

“Loomis, March 7, 1917.

“Mr. and Mrs. Simonsen:

“Inclosed you will find receipt for \$50.00, there is \$15.00 due yet. We have heard you are selling milk for \$14.00 per month, so we see she is paying for herself, which we are very glad to hear, but there is one thing we are not satisfied with, and that is, you put that old thing on Andrew, why she looks old enough to be his grand mother, with her glasses on and false teeth, no, just leave other peoples children alone, you may have trouble enough before you have your own boys brought up and send out into this world, so you shall not do ill to others, it may fall back on yourself some day, and what is that kind of talk he is telling about her operation? Is that why she had to wear a maternity dress, when she comes up to visit us, was she afraid we should see her shape and then she comes up here before I even had a chance to invite her, no, that is the most shameful I have seen, and I am absolutely ashamed that she is Danish, we have never in our lives seen such an impudent woman before in this country next time she comes up here I will lock the door, as we do not like to be insulted in our own house. Thanks for the money but let Andrew alone he has plenty of time he can get plenty of sickness, he don't need to marry it.

“Box 105.

“(Signed) MRS. C. RASMUSSEN,  
“Loomis, Cal.”

It was alleged that by the language used in this letter the said defendant intended to charge, and to be understood as charging, that plaintiff was pregnant, and was wearing a

maternity dress to hide and conceal her shape, in order that her pregnant condition might not be disclosed, and that she was to have an unlawful operation performed to relieve her of the child, and further that the letter was so understood by the readers thereof. It was further alleged that the charges so made in said letter were and are in every particular false, untrue, defamatory, libelous, and unprivileged and that they did expose plaintiff to hatred, contempt, ridicule, and obloquy, and that by reason thereof she was injured in her reputation and good name, and has also caused her grievous mental suffering and humiliation.

The Simonsens, to whom this letter was addressed, were intimate friends of the plaintiff and had introduced appellant's son Andrew to plaintiff. The plaintiff and Andrew thereafter were engaged to be married, but the engagement was broken when plaintiff learned of the letter above set forth. At the time of the trial Andrew was in the United States forces in France.

An answer was filed denying the material allegations of the complaint and by way of defense sets up that the communication was privileged. The case came on for trial before the court without a jury, and the court filed its findings of fact and conclusions of law sustaining the material allegations of the complaint and gave judgment in favor of plaintiff and against the defendant Mrs. C. Rasmussen, from which judgment said defendant has appealed.

Appellant argues that the judgment should be reversed for the following reasons: (1) That the allegations of the complaint that the letter was written "of and concerning plaintiff" is not sustained by the evidence; (2) that the plaintiff was not entitled to damages, as there is no presumption of general damages, since the words in the letter are not libelous *per se*; that they do not on their face apply to plaintiff and are not libelous of themselves, and (3) that the letter was a privileged communication.

1. The court found that by the use of the words and language contained in said letter "the said defendant Mrs. C. Rasmussen intended to charge and assert and to be understood as charging and asserting, and was by the readers of the said letter, and those to whom the contents thereof were disclosed, in fact understood as charging and asserting and it did charge and assert therein among other things that the

plaintiff was pregnant and with child and was wearing a maternity dress to hide and conceal her shape in order that her pregnant condition might not be disclosed, and that the said plaintiff was to have an unlawful abortion performed to relieve her of the child." And the court further found that the said charges "were in every particular false, untrue, defamatory, libelous and unprivileged. . . ."

[1] These findings are fully sustained by the evidence. That the said defendant referred to the plaintiff in this letter appears from her own testimony given at the trial: "Mr. Welsh: Q. Who were you referring to, Mrs. Rasmussen? A. I was referring to that girl. Q. Miss Peterson here? A. Yes, I did. Q. That is the one you referred to? A. Yes." It is also plain from the record that Mr. and Mrs. Simonsen (the addressees of the letter) understood the letter as referring to the plaintiff. S. Simonsen testified: "I have known Helga Peterson since she came to this country. She came to our house quite often. Miss Peterson and my wife are very close friends. . . . I have no feeling against the Rasmussens. I don't like that letter they sent her very much. I have a feeling against them at the present time on account of the letter. . . . I did not make any effort to have Andrew Rasmussen become engaged to Miss Peterson nor did my wife that I know of. It is not true that my wife invited her there when she came there in the first place. My wife invited her to come to my place in North Sacramento. Andrew Rasmussen was there at the time. He came first." The plaintiff testified that when Mrs. Simonsen showed her the letter the first time "she said some mother-in-law I had to write a letter like that." This evidence of the plaintiff was received without objection. The testimony in the case shows that the Simonsens understood the letter to refer to the plaintiff and plaintiff's engagement to Andrew Rasmussen, the son of defendants.

[2] To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him. (*Burhart v. North American Co.*, 214 Pa. St. 39, [63 Atl. 410]; *Clark v. North American Co.*, 203 Pa. St. 346, [53 Atl. 237]; *Bohan v. Record Publishing Co.*, 1 Cal. App. 429, [82 Pac. 634].)

2. The appellant takes the position that since plaintiff's name is not mentioned in the letter there is no libel *per se*

and therefore no presumption of general damages. Her position in this regard is untenable. The letter, we think, is on its face libelous; and it is alleged and proven that the said letter referred to the plaintiff. [3] Words imputing to a woman a want of chastity are actionable *per se*. (*Preston v. Frey*, 91 Cal. 107, [27 Pac. 533]; *Hitchcock v. Caruthers*, 82 Cal. 523, [23 Pac. 48]; *Kedrolivansky v. Niebaum*, 70 Cal. 216, [11 Pac. 641]; *McKinney v. Roberts*, 68 Cal. 192, [8 Pac. 857].) Damage to a person's reputation is presumed to result from the publication of a libel *per se*. (*Bohan v. Record Publishing Co.*, 1 Cal. App. 429, [82 Pac. 634].)

3. There is nothing in the record showing, or tending to show, that the letter was a privileged communication. The letter was not in response to any inquiry made by the Simonsens. [4] A privileged communication is one made "without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." (Sec. 47, subd. 3, Civ. Code.)

[5] The burden of proving the privilege as set up in the answer was upon the defendant. (*Schomberg v. Walker*, 132 Cal. 224, [64 Pac. 290]; *Adams v. Cameron*, 27 Cal. App. 625, [150 Pac. 1005, 151 Pac. 286].) The testimony shows an absence of privilege and the said letter and charges were by the trial court found to be false, malicious and unprivileged.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 21, 1920, and a petition to have the cause heard in the supreme court, after judgment by the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Civ. No. 3377. First Appellate District, Division Two.—May 22, 1920.]

KOKOA B. CONRAD, Respondent, v. WILLIAM LA PLANTE, as Executor, etc., Appellant.

- [1] TRIALS—ACTION ON NOTES AND FOR MONEY LOANED—CONFLICTING EVIDENCE—PROVINCE OF TRIAL COURT—FINDING—APPEAL.—In this action, in four counts, three of which were upon promissory notes and the fourth for money loaned, the evidence of plaintiff and defendant being conflicting, the trial judge was required to determine whether he should believe the evidence offered on behalf of plaintiff or the confessions of fraud and swindling offered to support the position of defendant, and he having found in favor of plaintiff, his conclusion was not subject to reversal by the appellate court.
- [2] ID.—DATE OF TRANSACTION — ERRONEOUS FINDING — ABSENCE OF PREJUDICE.—In such action, the plea of the statute of limitations not having been made, the defendant was not injured by a finding, in accordance with the fourth allegation of plaintiff's complaint, that a given sum of money was loaned by plaintiff to defendant on or about a specified date, from which date the judgment carried interest, whereas the testimony of plaintiff was that the loan was made at an earlier date.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. R. Young for Appellant.

Dana Ong, Paul J. Schenck and Richard Kittrelle for Respondent.

NOURSE, J.—Defendant appeals from a judgment rendered against him and in favor of plaintiff for \$2,750 upon a complaint containing four causes of action, the first three of which were upon promissory notes and the fourth for money loaned to the amount of \$1,500. The attack upon the judgment is confined to that portion of it which relates to the fourth cause of action.

[1] The facts material to the opinion are: In November, 1915, plaintiff delivered to defendant \$3,000 and received

from him shares of stock in the National Film Corporation of the par value of \$2,000. As a part of the transaction it was agreed that the plaintiff should be employed as an actress or performer by the National Film Corporation at a salary of forty dollars per week. After plaintiff's money had been obtained by the defendant she was employed for a period of two weeks and paid the stipulated salary. Thereupon the corporation ceased to do business and permitted its charter to lapse through its failure to pay the state license tax. In February, 1916, plaintiff called upon defendant and made a demand for the return of her money, and thereupon defendant gave her \$250 in cash, the three notes which are the basis of the first three causes of action herein, amounting to \$1,250, and, as the plaintiff alleged and testified, promised to give her \$1,500 more. The evidence relating to the transactions in November and February is conflicting. On behalf of plaintiff it is shown that the original transaction was a loan of \$2,000, evidenced by a promissory note and secured by certificates of stock of the National Film Corporation of the par value of \$2,000. The second installment of \$1,000 it is claimed was also loaned to defendant by plaintiff, for which she received neither note nor security. On behalf of defendant it is claimed that the original transaction was a sale of 3,000 shares of the National Film Corporation at par for the sum of \$3,000, which admittedly were of no value whatever. Defendant was president of this company.

The weakness of defendant's position in this respect is found in his own testimony to the effect that the company was at that time "broke and everybody knew it," and that the stock was worthless; also in the testimony of one Miller, an agent of defendant, that "our company was practically broke, and we didn't know whether we were going to get another dollar in or not; and I was broke, and everybody else was broke; so it was a very uncertain proposition." Then the witness Hale, an employee of Parsons at the time of the original transaction, testified regarding the conversations had in his presence between defendant and Miller, as follows: "Mr. Miller said we had a sucker, in plain English, talking of a woman who got money, and going to put in so much money, lend so much money, but you have to use her. I says, 'Has she ever done acting?' I was told no. I says,

'Good-night,' that is my favorite expression. Then I was explained to use this woman's money, we can't make any— Q. Who stated this? A. Mr. Parsons. Q. Did he say who the woman was? A. Miss Kokoa, Princess Kokoa—Kokoa Baldwin. Q. Was there anything more stated there with reference to the— A. She was to put \$3,000 in—she was to loan \$3,000 to the company, for which she was to receive some National stock security. She was to receive stock for security and this \$3,000, or whatever the sum was—I can't swear to that, Judge—that sum, but it was in the thousands—we were to make two pictures and get some money— Q. Who said that? A. Mr. Parsons. Q. At the time when Mr. Miller was present? A. Well, Mr. Miller was in and out of the studio; I can't exactly say that he was out. Mr. Miller was present on one occasion when discussing this money matter, he was to get his share out of it, \$500, for getting the money, and I got \$150 out of it, two weeks' work. The Court: Who said Mr. Miller was to get \$500 out of it? A. Parsons told me that this money Mr. Miller was to procure and from this money he gets a commission of \$500, which only would leave us \$2,500 to make the pictures. . . . Q. Have you stated all that was said about lending the money? A. Well, lending of the money—I don't know who it was made to directly, but Mr. Parsons was to give security of National stock for the loan of the money. I remember he said that, laughing, he says, 'I gave her some security, National Film Corporation stock.' ”

In addition to this it is admitted that defendant, who was practically the sole owner of the stock of the corporation, had failed to pay the state license tax, so that the corporation forfeited its right to do business at about the time this transaction was had. On this evidence the trial court was required to determine whether it should believe the evidence offered on behalf of the plaintiff or the confessions of fraud and swindling offered to support the position of the defendant. Conflict in the evidence is clear, and even if this court could substitute its conclusion for that of the trial court, it would not be disposed to do so in view of the character of the evidence offered by defendant.

The evidence relating to the transaction occurring on February 15, 1916, is confined solely to the conflicting testimony of plaintiff and defendant, they being the only persons present at any time while the transactions were had.



The plaintiff testified that she returned to defendant his promissory note and the stock which she asserted had been delivered to her as security, and that in return therefor defendant paid her \$250 in cash, gave her three notes amounting to \$1,250, and promised to pay her \$1,500 more at a future date. Defendant testified that plaintiff appealed to him in a destitute condition, requesting him to buy back the stock which he claimed to have sold to her in the preceding November, and he gave her \$250 therefor, though he knew at the time that the stock was worthless; that the three notes were given with the understanding that they would be payable only in the event that defendant was able to sell one of the pictures in which plaintiff had participated, and that no promise of any nature was given regarding the payment of \$1,500, nor any other sum than that evidenced by the three notes.

It is argued that plaintiff's story is incredible because, having taken written promises to pay \$1,250, it is highly improbable that she would have accepted a verbal promise to pay \$1,500 with no written evidence thereof. But defendant's story regarding this transaction is just as incredible. The trial court had both witnesses before it; it had rejected defendant's testimony regarding the transaction of November, 1915, and was in a position to determine whether plaintiff's story of the February transaction should be believed. The finding of the court upon this issue cannot be disturbed.

[2] It is argued by appellant that the evidence does not support the finding that the sum of \$1,500 was loaned on or about the fifteenth day of February, 1916, as alleged in the fourth cause of action. In this connection it is said that, accepting plaintiff's story of the entire transaction, this loan was made in November, 1915, and not at the time alleged in the complaint. The judgment carries interest from the fifteenth day of February, 1916, and defendant is not harmed by the finding that the loan was not in fact made at an earlier date. This is especially true in a case where, as here, the plea of the statute of limitations is not made. Thus, if the finding was erroneous, it was harmless error which would not support a reversal.

For the reasons given the judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 3376. First Appellate District, Division Two.—May 22, 1920.]

GEORGE F. GUY, Respondent, v. HARRY R. LEECH  
et al., Defendants; SARAH L. BOND, Appellant.

- [1] **LIENS — PRIORITY OF — ACCEPTANCE OF TRUST DEED SUBJECT TO MORTGAGE IN PAYMENT FOR MATERIAL—RELIANCE UPON BY MORTGAGEE—RIGHT TO CLAIM MECHANIC'S LIEN—ESTOPPEL.**—Where a materialman agrees to accept a trust deed, subject to a mortgage for a specified amount, in payment for material furnished for use in the building of a house, and so advises the mortgagee, and such mortgagee advances the specified amount of money for the purpose of building such house, and such trust deed, subject to such prior mortgage, is executed and delivered to him, he will be estopped to set up as against the mortgagee that he did not accept the trust deed in payment for his material and in lieu of any lien which the law allowed therefor, notwithstanding the mortgagor subsequently became involved in financial difficulties and did not complete the house.
- [2] **ID.—ESTOPPEL—PLEADING.**—While the general rule requires an estoppel to be pleaded, there is an exception to this rule where the party is without knowledge that his claim must ultimately rest upon an estoppel.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Dana R. Weller, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Haas & Dunnigan for Appellant.

G. C. De Garmo for Respondent.

**LANGDON, P. J.**—This is an appeal by the defendant from that portion of a judgment which decrees that the mechanic's lien of plaintiff is superior to the first mortgage held by defendant and appellant upon certain real property in the county of Los Angeles. There were three actions involving the same issues, which were consolidated by the trial court and tried at the same time. In one of the actions the plaintiff Haslwanter sought to foreclose a mechanic's lien, and Sarah L. Bond, the appellant here, was made one of the defendants, as she held a first mortgage upon the

property. This lien was decreed to be superior to the mortgage, and appellant does not object to this portion of the judgment, but states in her brief that the same has been paid.

In the second suit, George F. Guy sought to enforce a mechanic's lien against the property and to have it declared superior to the mortgage. This was resisted by the mortgagee Bond. Before a determination was had of the questions raised in these suits, the mortgage became due by reason of default in some of its terms, and the mortgagee Bond sought to foreclose the same in yet another suit, in which said lien claimants were joined as defendants. It was stipulated that the complaints in the mechanic's lien foreclosures should be considered the answers and cross-complaints of said claimants in the mortgage foreclosure suit of Sarah L. Bond. The actions were consolidated, and the one issue presented in them all was, whether or not the mechanic's lien of the respondent was superior to the mortgage. The court found that it was, and from such determination the appellant prosecutes this appeal.

[1] The facts with relation to this question are: Harry R. Leech was a builder and he borrowed from Sarah L. Bond \$3,000 for the purpose of building a house. For this amount he gave her his note, which was secured by a mortgage upon the house, then partially constructed. This mortgage was dated May 9, and recorded May 19, 1917. Leech had previously built houses, which were financed by building loans, and had purchased the lumber therefor from the respondent. In borrowing the money to carry on the work he had given first mortgages, and the respondent had furnished the lumber and had taken deeds of trust subject to the first mortgages upon the property upon which the work was being done. In this instance, Leech and Guy—it is admitted by both of them—undertook to make the same arrangement, and Guy agreed to furnish the lumber and to take a deed of trust in payment therefor, subject to the first mortgage. He did furnish the lumber in accordance with this understanding and it was used in the construction of the house. This construction work was well under way when Leech applied to Mrs. Bond's agent, Patterson, for the loan of \$3,000. Mr. Patterson testified that he called up Mr. Guy on the telephone when Leech applied for the loan; that he told him

that he considered the loan of \$3,000 "pretty heavy, but Mr. Leech tells me that you are taking a trust deed for your lumber and material which would help the loan." Patterson then told Guy that one of his clients was already "mixed up" in some litigation over a loan and he did not wish this to happen again, and he asked him expressly whether he was taking a trust deed for the lumber and material subject to the first mortgage, and Guy said "yes." The respondent Guy, in his own testimony, states that he has heard the testimony of Mr. Patterson and that Mr. Patterson correctly testified as to the conversations and transactions between them. After these representations Mrs. Bond made the loan on May 19, 1917. In June, 1917, Leech executed a trust deed to Guy for \$747, the amount of the lumber bill. He executed his note for said amount and sent it to Guy directly, and sent the trust deed securing the note to be recorded. It was duly recorded on June 4, 1917, and, under the instructions from Leech, was sent by the recorder to Guy. Apparently, so far, everything was satisfactory to all parties, and the transactions were in accordance with the understanding of all persons concerned. It is because of subsequent events, occurring after this trust deed went into effect, that Guy seeks to escape the effect of his action in agreeing to accept the trust deed in payment.

Within a month Leech became involved in financial difficulties and did not complete the house. It appears from the record that the plumbing and a portion of the painting, and other minor matters, were left uncompleted, and that it would cost about \$200 to finish the house. Leech ceased work upon the house, and the cement contractor, Halswanger, who had not been paid, filed his notice of lien for \$230, which lien was adjudged in these consolidated actions to be superior to the mortgage, and is not disputed by the appellant.

In October, 1917, Leech being in default in the payment of interest upon the first mortgage, Mr. Patterson, the representative of the mortgagee, telephoned to Guy, who had the trust deed, and Guy said that he would pay the interest as soon as he could get a deed from Mr. Leech conveying the property to him. He later paid the interest and said he had received a deed from Leech. Guy had called upon Leech in October and had asked what was to be done about

completing the house, and Leech had told him that he was trying very hard to dispose of the house, and Guy had suggested that Leech deed the property to him to avoid the expense and trouble of a foreclosure of his deed of trust. Leech asked for more time, which was granted, and later, upon another request from Guy, he executed a quitclaim deed to Guy.

In November, 1917, Guy filed his notice of lien and returned to Leech the trust deed and note and the quitclaim deed. He made no reconveyance of the property, but merely returned to Leech the evidences of the transfer of interest to himself. So far as the record shows, the trust deed is still on record unreleased and affects the title to this property. Guy now seeks to enforce his mechanic's lien. He takes the position that he accepted the trust deed in payment for his lumber upon the understanding that it was to be subject only to the first mortgage, and upon the understanding that the house would be completed by Leech, and that as an intervening lien has accrued and the house is not completed, he does not wish to rely on his trust deed, but wishes to enforce his mechanic's lien. His explanation of his return of the quitclaim deed to the property, given to him in October by Guy, is that it was not a grant deed and was not signed by the wife of Leech, and that, therefore, it was not a deed satisfactory to him, and he had consequently returned the instrument to Leech.

We may eliminate the question of the sufficiency of the second deed and of Guy's acceptance thereof; for it appears to us that the facts regarding the trust deed are decisive of this case. Respondent agreed, as appears by his own testimony, to accept the trust deed in payment of his debt, which trust deed was to be inferior to the building money mortgage given to Mrs. Bond. He represented to Mrs. Bond that this would be done after he had been told that she would consider the loan a heavy one unless he agreed to do this. In other words, he, by his representations, caused her to believe in the security of the loan and to advance the money. The advancement of this money by her for the building was an advantage of him, as he was selling the lumber, and had sold lumber under such conditions to Leech for several other houses. He acted in accordance with his representations and took the trust deed. His later disappointment in re-

gard to the action of Leech in not paying the cement bill and in not completing the house cannot affect the rights of Mrs. Bond. This is a matter between Guy and Leech. The arguments of respondent that Leech has not fulfilled his part of the contract and, therefore, Guy is not bound thereby, would be pertinent if the contest was between Guy and Leech. The value of Mrs. Bond's security is impaired because Leech has not completed the building, and, for the same reason, the value of Guy's security is impaired. Leech has not fulfilled his duty toward either of them. Each took this chance with reference to Leech. There appears to be no reason why Guy should shift his share of this burden upon the shoulders of Mrs. Bond in addition to her own share of the burden.

The question of law involved here is carefully discussed, both upon principle and authority, in the cases cited to us by the appellant, most of which are reviewed by our own supreme court in the case of *Martin v. Becker*, 169 Cal. 301, at page 309 et seq., [Ann. Cas. 1916D, 171, 146 Pac. 665]. It is said in the case of *Martin v. Becker*, *supra*, in enumerating the different classes of cases in which the taking of new or additional security operates to destroy an existing lien—that where it would be fraud upon other claimants to permit the earlier lien to be held valid, equity interposes and declares it to have been waived or lost by the taking of the later security, or what is, in effect, the same, erects a bar to its enforcement.

The respondent is estopped to set up as against this appellant that he did not accept the trust deed in payment for his material and in lieu of any lien which the law allowed to him therefor. [2] Respondent seeks to avoid the force of the facts constituting the estoppel by reason of the fact that the estoppel was not pleaded. While it is true that the general rule requires an estoppel to be pleaded, yet it has been held that there is an exception to this rule where the party is without knowledge that his claim must ultimately rest upon an estoppel. (*Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, [49 Pac. 559].) In the present case, the appellant did not rely upon an estoppel as the foundation of her claim. She believed and alleged that Guy had accepted the trust deed in payment of his debt. The evidence upon the trial disclosed the fact that Guy was denying his

acceptance of this trust deed. In rebutting this contention, facts were introduced in evidence which would constitute an estoppel. Under such circumstances appellant was entitled to take advantage of these facts, although they had not been pleaded. It is said in *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, [41 Pac. 1017, 45 Pac. 252], that an estoppel *in pais* may be shown by way of equitable rebuttal, and that it is only when the plaintiff must rely upon an estoppel *in pais* in order to maintain his action at all against the defendant that it must be pleaded. In the present case it is admitted that Guy agreed to take the trust deed in payment; the trust deed to him was put upon record; he had told Mrs. Bond's agent that he would accept it subject to the first mortgage, and she alleged that he had so accepted it in payment. It was only when he sought to evade these facts that the estoppel needed to be invoked as an equitable rebuttal.

There are, however, no findings upon which we could order a judgment to be entered decreeing the priority of appellant's mortgage lien. We have no power to make findings for the trial court. (*Blood v. La Serena L. & W. Co.*, *supra.*) Therefore, the judgment, in so far as it relates to the lien of the respondent Guy, and in so far as it decrees that lien to be superior to the mortgage of the appellant, is reversed.

Nourse, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1920.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Civ. No. 2980. Second Appellate District, Division One.—May 24, 1920.]

C. S. HUTCHISON, Respondent, v. JOHN P. HOLLAND,  
Appellant.

- [1] **PROMISSORY NOTES—ACTION TO RECOVER BALANCE FROM UNDISCLOSED PRINCIPAL—UNSUPPORTED FINDING.**—In this action to recover a balance due on two promissory notes, the trial court was not justified in finding from the evidence presented that the defendant against whom judgment was rendered, but who did not sign the notes, was the undisclosed principal of his codefendant, who signed the note, but whom the court relieved from liability.
- [2] **EVIDENCE—RIGHT OF TRIAL COURT TO DISREGARD.**—Where the testimony of a defendant stands uncontradicted, and his statements do not bear the imprint of inherent improbability, the trial court is not authorized to disregard them.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Wm. D. Dehy, Judge. **Reversed.**

The facts are stated in the opinion of the court.

J. R. Whittemore and Floyd L. Anderson for Appellant.

Ben F. Gray and Geo. S. Hupp for Respondent.

**JAMES, J.**—Defendant Holland appeals from a judgment entered against him. The action was brought to recover a balance due on two promissory notes. The notes were executed by defendant Marie C. Heath, and certain real property was made security for the payment thereof, against which a trust deed was executed. Appellant did not join in the making of the promissory notes or the deed; in fact, his name did not appear in the instruments referred to at all. The notes, as before mentioned, were two in number; one was made payable to Elizabeth E. Curtis and the second to Helen C. Brennan. The two last-named persons indorsed the same and they were transferred to Nina A. Hutchison, who paid therefor \$1,750. At the time the trust deed and notes were executed there was a first mortgage lien against the property, amounting to \$3,000; hence the trust deed became second in order of security. Default was made in



the payment of the notes, and upon sale of the property under the trust deed being had, a small part only of the principal debt evidenced by the notes was realized. Nina A. Hutchison transferred her interest to the plaintiff here and this suit was brought to collect the deficiency. It was alleged in the complaint, and the court found the facts accordingly, that Holland was the undisclosed principal of Marie C. Heath. While rendering judgment against Holland, the court found in favor of Marie C. Heath and determined that she was not liable for any part of the money claimed. It is the contention of appellant that where a promissory note is executed unqualifiedly it cannot be asserted that there exists any undisclosed principal against whom recovery may be had. Respondent has cited ample authority to show that appellant is correct only in his statement of the law where the notes considered are negotiable; that where the notes are not negotiable, an undisclosed principal may be held. [1] Admitting that the notes here exhibited are of the character which permits recovery against an undisclosed principal, it is the contention of appellant that under the evidence the court was not justified in finding that Holland held any relation of principal such as to make him liable to the plaintiff therefor. As the evidence discloses, Holland presented the trust deed and notes to the plaintiff, who was Nina A. Hutchison's agent, and recommended their purchase as a good investment; he stated to plaintiff that Marie C. Heath was the owner of the property; he also informed plaintiff of the existence of the \$3,000 first mortgage lien; plaintiff and Nina A. Hutchison visited the property for the purpose of investigating the character of the security offered; after examining the property plaintiff closed the deal on behalf of his principal and paid to Holland \$1,750, and received the promissory notes of Marie C. Heath, which were indorsed with the names of the payees. Throughout the transaction up to this point it was not claimed by the plaintiff or his principal that Holland pretended to have any interest in the property or the notes. Plaintiff further testified that when interest installments became due and were unpaid, he demanded payment of Marie C. Heath and she referred him to Holland, and Holland in turn referred him back to Marie C. Heath, stating that she would take care of it. Holland testified that he had

no interest in the transaction other than that he received a commission. He stated that it was a fact that Marie C. Heath held the title to the property only for Curtis and Brennan, who were "eastern" ladies, and that he (Holland) was the agent of Curtis and Brennan; that upon sale of the promissory notes secured by the trust deed to Nina A. Hutchison, he (Holland) had, after deducting his commission, remitted the remainder of the money to Curtis and Brennan. [2] The testimony of Holland stands uncontradicted. It may have been that the court disbelieved his statements, but, as the record discloses them, the statements do not bear the imprint of inherent improbability; hence we must conclude that they amounted to substantial evidence and that the court was not authorized to disregard them. Accepting Holland's testimony at its face value, it did not establish that he occupied the position of an undisclosed principal toward Nina A. Hutchison, or this plaintiff. That Marie C. Heath is liable upon the note obligation, there can be no possible question. She made the notes, executed the trust deed, was in fact the record owner of the real property concerned, and was accepted by the Hutchisons in that relation. We are at a loss to understand why the court by its judgment relieved the maker of the notes from the duty to respond to the claim of the plaintiff.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on July 22, 1920, a majority of the Justices not having assented to the granting thereof.

[Civ. No. 3326. First Appellate District, Division One.—May 24, 1920.]

N. BAR DUE, Respondent, v. SARAH COX, Appellant.

- [1] **APPEAL—PRESENTATION OF POINTS — INSUFFICIENCY OF BRIEFS.**—The appellate court is not called upon to consider objections to the judgment and action of the trial court which are merely stated without citation of authority, or any argument beyond the bare statement of the point.
- [2] **NUISANCES—MALICIOUS ERECTION AND MAINTENANCE OF FENCE—EVIDENCE—FINDING.**—In this action, brought by the plaintiff under the provisions of the act of the legislature of May 28, 1913 (Stats. 1913, p. 342), to have a certain fence, wholly erected and maintained upon the premises of the defendant, declared a private nuisance, and removed forthwith, or reduced to a height not exceeding ten feet, the trial court properly concluded from the evidence introduced, and particularly from the circumstances surrounding the erection of the fence, that it unnecessarily exceeded ten feet in height, and was maliciously erected, and so maintained, for the purpose of annoying the plaintiff and his tenants.
- [3] **ID.—CONSTITUTIONALITY OF ACT OF LEGISLATURE.**—The act of the legislature of May 28, 1913 (Stats. 1913, p. 342), which provides that any fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupants of adjoining property, shall be deemed a private nuisance, for the abatement of which such owner or occupant may enforce the remedies prescribed in the section of the Civil Code, is not unconstitutional.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

Arthur E. Nathanson for Appellant.

J. H. Morris for Respondent.

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2. Liability for malicious erection of fences, generally, notes, 40 L. E. A. 177; 25 L. E. A. (N. S.) 831; 52 L. E. A. (N. S.) 736.

Right of adjoining owner to enjoin fence of unusual height, notes, 9 Ann. Cas. 734; Ann. Cas. 1915A, 718.

WASTE, P. J.—The plaintiff brought this action to have a certain fence, wholly erected and maintained upon the premises of the defendant, declared a private nuisance and removed forthwith, or reduced to a height not exceeding ten feet. He also prayed that the defendant be enjoined and restrained from preventing or interfering with plaintiff, should plaintiff undertake to abate and remove the fence, or go upon the property of the defendant for that purpose. The action was predicated upon the alleged ground that said fence was maliciously erected and maintained to annoy plaintiff, and any of his tenants who might occupy his flats, and upon the theory that the fence excluded the light and air of plaintiff's tenants, to the annoyance and prejudice of plaintiff, and to the damage of plaintiff's property. At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, which was denied. Defendant then introduced considerable testimony. On submission of the case judgment was rendered for the plaintiff and the defendant appeals.

The action is brought by the plaintiff under the provisions of the act of the legislature of May 28, 1913 (Stats. 1913, p. 342), which provides that any fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupants of adjoining property, shall be deemed a private nuisance, for the abatement of which such owner or occupant may enforce the remedies prescribed in the sections of the Civil Code.

[1] Appellant in his opening brief specifies some eleven points as "questions involved in this action." He presents, however, but two with that particularity which invites our consideration. The remaining objections to the judgment and action of the trial court are merely stated without citation of authority, or any argument beyond the bare statement of the point. As an example we cite appellant's sixth point: "Errors of law in denying defendant's motion for a nonsuit." In his brief, under the title "Motion for Nonsuit," he merely quotes *verbatim* the reporter's transcript of the motion made in the court below and the court's ruling, without a single comment. At another point in the brief appellant inserts the heading "Insufficiency of the evidence to sustain the findings of fact, conclusions of law

and the judgment," followed by some seventy-seven pages of extracts from reporter's transcript, without argument, comment, or suggestion as to why this testimony is insufficient. In his closing brief appellant merely asserts that there is "no substantial conflict" in the testimony. We are not called upon to consider points so stated. (*Gray v. Walker*, 157 Cal. 381, 386, [108 Pac. 278]; *Dore v. Southern Pac. Co.*, 163 Cal. 182, [124 Pac. 817].)

In view of the importance of the legal questions involved, however, we have examined the contention that the act of the legislature, under which the suit was brought, is unconstitutional, and have read much of the evidence in the transcript, to determine for ourselves its sufficiency to sustain the finding of the court, that the fence in question unnecessarily exceeds ten feet in height, and was maliciously erected, and is so maintained, for the purpose of annoying the plaintiff and his tenants.

[2] The plaintiff and the defendant are adjoining property owners. Some years prior to the commencement of the suit the plaintiff moved an old dwelling to the rear of his lot, so that it practically abuts on defendant's property. The latter thereafter erected, wholly within the line of her own property, the fence in question, but so close to the rear of plaintiff's structure that it effectively shut off the view from the lower windows of plaintiff's house and obstructs the light and air thereof. Defendant has grown vines over this tight board fence, which she waters at times, and the testimony is that the water is thrown through the cracks of the fence and wets the interior of the lower flat of plaintiff's premises. Defendant has constantly prevented workmen engaged in repairing plaintiff's premises from in any way going upon her lot and has exhibited an embittered feeling and a defiant attitude toward the plaintiff and his tenants. From photographs and the evidence of witnesses it is apparent that the fence effectually boards up the lower windows of plaintiff's lower flat. There does not seem to be any necessity for it being maintained at a height in excess of ten feet. This is evidenced by the fact that the fence on the property line of defendant adjoining another owner is of a different character and not so high. The fact of its peculiar construction, the way it is maintained in front of plaintiff's property, the attitude of defendant as testified to

by various witnesses, and the whole circumstances surrounding its erection and maintenance, plainly indicate a malice on the part of defendant toward the plaintiff. This, we think, was the only logical conclusion to be drawn from the evidence, and was the ultimate fact for the trial court to determine, in the light of these circumstances.

[3] In support of her contention that the act is unconstitutional, defendant relies upon two decisions of the supreme court of California, construing the act of the legislature of March 9, 1885, "regulating the height of division fences and partition walls in cities and towns." This act is set out in full in the case of *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 114, [37 Pac. 192]. The gist of that decision is that the fence there under consideration was a division fence and that it was not competent for the legislature to vest in the adjoining proprietor the power to prevent his neighbor from building such a structure on his own property, provided it is not a nuisance. The other case is *Ingwersen v. Barry*, 118 Cal. 342, [50 Pac. 536], which is based upon the *Western Granite* case. The act we are now construing was, however, passed after these decisions, and, judging by their context, with the purpose of supplying the very element necessary to render it effective, which was missing from the former statute—the malicious maintenance of a private nuisance. Under the authority of *Flaherty v. Moran*, 81 Mich. 52, [21 Am. St. Rep. 510, 8 L. R. A. 183, 45 N. W. 381]; *Rideout v. Knox*, 148 Mass. 368, [12 Am. St. Rep. 560, 2 L. R. A. 81, 19 N. E. 391], and *Horan v. Byrnes*, 72 N. H. 93, [101 Am. St. Rep. 670, 62 L. R. A. 602, 54 Atl. 945], we believe it to be constitutional.

The judgment is affirmed.

Richards, J., and Knight, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 23, 1920, a majority of the Justices not having assented to the granting thereof.

[Civ. No. 2159. Third Appellate District.—May 24, 1920.]

BESSIE McCORD, Administratrix, etc., et al., Respondents,  
v. J. D. MARTIN et al., Defendants; WILLIAM  
LINDEMANN, Appellant.

- [1] **PLEADING — CASE PRESENTED — RIGHT OF RECOVERY.**—A plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs.
- [2] **ID.—ADMISSION OF EVIDENCE WITHOUT OBJECTION—WAIVER OF OBJECTION THAT NO ISSUE PRESENTED.**—Where a cause is tried upon the theory that a certain fact is in issue and evidence thereon is received without objection, it is too late thereafter to complain that no such issue was presented.
- [3] **CORPORATIONS—SALE OF STOCK—DUTY OF SECRETARY TO DISCLOSE PRICE OFFERED—PARTICIPATION BY OTHER STOCKHOLDERS IN BONUS RECEIVED.**—One who is a stockholder and the secretary of a corporation is under no legal obligation to disclose to the other stockholders that he has received an offer of a given amount per share for his stock in the corporation if such other stockholders will sell at a lesser amount per share to the extent that the purchaser may secure a given number of shares; and if such other stockholders, uninfluenced by the secretary, are willing and agree to and do sell at the lower price, they have no claim upon the additional price or bonus received by the secretary.
- [4] **ID.—POOLING OF STOCK—JOINT ADVENTURE NOT CREATED.**—A joint adventure does not exist where property is pooled by the several owners to be sold at a particular price, and each contributor is to receive the proceeds of the property contributed by him.
- [5] **JUDGMENT OF DISMISSAL — STIPULATION FOR — RES ADJUDICATA.**—Where the parties to an action, through their respective counsel, stipulate in open court for the dismissal of the action and the payment of their respective costs, and judgment of dismissal is thereupon entered, that judgment constitutes a bar to another suit afterward brought upon the same cause of action.
- [6] **ID.—RECITALS IN — WHEN CONCLUSIVE.**—The recitals in a judgment of dismissal showing that the parties to the action, through their respective counsel, stipulated to the dismissal of the action and the payment of their respective costs, in the absence of evidence to the contrary, are conclusive upon the parties.
- [7] **ID.—ENTRY UPON STIPULATION—JUDGMENT ON MERITS.**—Where the parties appear in open court and stipulate for a dismissal the situation is not covered by section 581 of the Code of Civil Procedure, but a judgment entered thereon is a judgment on the merits as contemplated by section 582 of said code.

APPEAL from a judgment of the Superior Court of Kings County. M. L. Short, Judge. Reversed.

The facts are stated in the opinion of the court.

Lamberson & Lamberson for Appellant.

W. B. Wallace, *in pro. per.*, and Bradley & Bradley for Respondents.

BURNETT, J.—The action was begun in the superior court of the county of Santa Clara on the 22d of December, 1913. On the eighth day of October, 1914, an amendment to the complaint was filed to which the defendant, William Lindemann, filed a demurrer. The demurrer was sustained without leave to amend on the twenty-eighth day of December, 1914, and thereafter, on the eighteenth day of January, 1915, judgment was entered in favor of defendant, Lindemann. An appeal from such judgment was thereafter taken by the plaintiffs, and the judgment was reversed by the district court of appeal of the first district. (*McCord v. Martin*, 34 Cal. App. 129, [166 Pac. 1014].) The *remittitur* was filed in the court below on the sixth day of August, 1917, and thereafter an order was made by said superior court that the defendant answer within ten days after notice of said order. Within time the answer was filed, and thereafter, on motion of plaintiffs the action was transferred for trial to the superior court of Kings County. On January 15, 1918, the plaintiffs gave notice of a motion to strike out portions of the answer of defendant Lindemann, including paragraph 16 thereof, which set up as *res judicata* a judgment of dismissal in an action between the same parties entered by the superior court of the city and county of San Francisco on the sixteenth day of May, 1913, as follows:

“It appearing to the court from the stipulation filed herein on the 12th day of May, 1913, signed by the attorneys of record of all of the respective parties in interest, that plaintiffs (naming them), through their attorneys, Messrs. Bradley & Bradley and F. H. Gould, and that defendant and cross-complainant J. D. Martin, through his attorneys, Messrs. Morrison, Dunne & Brobeck, and that



defendant William Lindemann, through his attorney Alfred Daggett, and that cross-defendants (naming them), through their attorneys, Messrs. Bradley & Bradley and F. H. Gould, have, and each of them has, stipulated that the above-entitled action and every part thereof shall be dismissed as against each and all of the parties to the above entitled action, and that all of said parties have further stipulated that each and all of the parties to said action shall pay their costs of suit incurred by them respectively; and each and all of the above-named parties, through their said respective attorneys having stipulated in open court on the 12th day of May, 1913, that said action and every part thereof shall be dismissed pursuant to the terms of the aforesaid stipulation on file herein, and good cause appearing therefor.

"Now therefore, it is ordered that the above-entitled action and every part thereof be, and the same is hereby dismissed as to all the parties to said action.

"It is further ordered that each and all of the above named plaintiffs and each of said defendants and said cross-complainant and each and all of said cross-defendants pay his or their own costs incurred by him or them respectively in said action.

"It is further ordered that this judgment of dismissal be duly entered by the Clerk."

Paragraph 17 of said answer, to the effect that said judgment has never been reversed, modified, or appealed from, and has become final, and that the cause of action therein was the same as the action admitted to be set up by the complaint herein, was also stricken out.

The plaintiff, J. W. McCord, having died, his administratrix was substituted by order of said court. The cause was tried without a jury, and on the first day of March, 1919, the court filed its findings of fact and conclusions of law, and judgment was entered thereon in favor of plaintiffs as against William Lindemann on the eleventh day of March, 1919. Two days later the defendant Lindemann gave notice of a motion to enter a different judgment, which motion was denied on the twenty-fourth day of March, 1919. The proceedings upon this motion have been preserved in a bill of exceptions. Defendant Lindemann has appealed from said judgment and said order denying his said motion.

The first point made by appellant worthy of serious consideration is stated as follows: "The findings of fact are not responsive to the issues made by the complaint and answer and are outside the pleadings, and if the findings justify any judgment at all against appellant, it is for a cause of action wholly different from that stated in the complaint." The theory of the complaint is that defendant Martin knew that one George T. Cameron of San Francisco desired to purchase at least twenty thousand shares of the stock of the Lost Hills Mining Company belonging to the assignors of plaintiffs and was willing to pay therefor "a large sum of money in excess of five dollars per share"; that thereafter said Martin devised a scheme to induce said stockholders to pool their stock to sell in one block to an undisclosed purchaser for five dollars per share; that to enable Martin to carry out said scheme he sought the aid of Lindemann and paid the latter a large sum of money for his assistance; that thereafter defendants represented to said joint stockholders that they knew a man, whose name they did not disclose, who would buy all of the stock of said Lost Hills Mining Company, but not less than twenty thousand shares, for five dollars per share and no more; that it was worth no more than five dollars per share, and could not be sold for more; "that it would be necessary to pool said stock and place it in escrow in a bank to the amount of at least twenty thousand shares, in order to induce said proposed purchaser to come to Hanford and buy the same; that defendants and said E. L. Lindemann would join with said joint stockholders in pooling their said shares and placing them in escrow to be sold in one lot at the price of five dollars per share"; that said representations were false, but were believed and relied upon by said joint stockholders, and they did thereupon so pool their stock and placed it in escrow with the First National Bank of Hanford to be delivered in one block to a purchaser to be produced by defendant Martin, upon the payment of five dollars per share therefor.

"That thereafter said proposed purchaser, who was said Cameron, upon being notified by defendants that said stock had been placed in escrow as alleged, went to Hanford and in accordance with a secret agreement with defendants brought all the said stock so placed in escrow, for eight

dollars per share, of which he placed five dollars per share in said bank for all thereof, and paid the balance of the aggregate value thereof at eight dollars per share to defendants. That the value of said stock as so pooled to be sold in one block was at the time it was so pooled and sold, eight dollars per share."

Being stated concisely, then, the only cause of action appearing in the complaint rested upon these facts: Both defendants Martin and Lindemann falsely represented to other stockholders that if they would pool their shares of stock they could sell to a certain purchaser for five dollars per share, said stockholders believed and acted upon said representations; whereas, said Martin and Lindemann knew that the stock could be sold for eight dollars per share and had an agreement to that effect, and did actually consummate the sale for that price, but the other stockholders in accordance with the terms of said pooling arrangement received only the sum of five dollars per share, said Martin and Lindemann appropriating to their own use the balance of some ninety-one thousand dollars. If these facts had been shown and found it could hardly be seriously argued that plaintiffs were not entitled to a judgment against defendants. The proper legal characterization of the transaction might be in some doubt, but at any rate the principles of equity as formulated in the code and administered by the courts are ample to reach and defeat such iniquitous conduct. But the trouble is, the trial court found that Cameron agreed with Martin "to purchase not less than twenty thousand shares for a price not exceeding five dollars per share; that Martin then communicated to a few of plaintiff's assignors the information, and they in turn conveyed it to the other stockholders; that defendants did not devise any scheme for effecting a sale of the interest of said Martin & Dudley in said mining claims and said Lake Shore Oil Company stock and the stock of Lost Hills Mining Company to Cameron, and Lindemann at no time knew of the plans or expectations of the firm of Martin & Dudley to sell the interest of said Martin & Dudley in said claims to Cameron." It is further found in reference to a certain sum of money that was paid by Martin to Lindemann that it "was paid to Lindemann not in pursuance of the scheme alleged in paragraph VII of the complaint, but was paid to Linde-

mann in order to remove Lindemann's opposition to the sale by him of his stock and that of his wife in the Lost Hills Mining Company, and that said Lindemann might not oppose the sale by plaintiff's assignors of their stock owned by them respectively in said Lost Hills Mining Company. . . . Lindemann did not have any agreement with defendant Martin or with the firm of Martin & Dudley for a share nor did Lindemann receive from defendant Martin or from the firm of Martin & Dudley any share in any profits which were made by defendant Martin or by the firm of Martin & Dudley in the sale to Cameron . . . nor did Lindemann agree with defendant Martin to aid and abet, or aid or abet nor did he in fact aid and abet or aid or abet defendant Martin in carrying into effect the scheme alleged in paragraph VII of the complaint," said scheme contemplating, as we have seen, the fraudulent claim and sale of the stock for five dollars per share. It is thus apparent that the findings negative every material allegation of the complaint upon which a judgment against Lindemann could possibly be justified. In fact, he is expressly acquitted of any improper or reprehensible conduct within the scope and intent of the attempted cause of action. The judgment would necessarily, therefore, have been in favor of Lindemann (as it was actually in favor of Martin), had not the trial court gone outside the pleadings and determined certain facts to which the issues were not addressed. Appellant states the gist of these findings substantially as follows: About a week prior to March 20, 1911 (the latter date being the time when the so-called escrow agreement was signed), appellant received a letter from the Mercantile Trust Company of San Francisco representing that if a certain client whom they represented purchased at least a majority of the stock of the Lost Hills Mining Company at the price of five dollars per share, their client would pay Mr. Lindemann fifteen dollars per share for his stock. On March 20th following the said escrow agreement was signed and delivered authorizing said First National Bank of Hanford to deliver the stock to the purchaser for five dollars per share. Up to this time appellant did not know who the purchaser was or whether said offer was genuine. After said escrow agreement was made appellant ascertained who was the prospective purchaser. Subsequently on March 30th Mr.

Cameron came to Hanford and bought at five dollars per share the stock of several of plaintiffs' assignors who had signed the escrow agreement; also appellant's stock at fifteen dollars per share; and also the stock at five dollars per share of several others of plaintiffs' assignors, who brought their stock to the bank. Lindemann was secretary of the company, and the court's reason for imposing upon him this liability is disclosed in the finding that he "owed a duty to the other stockholders of said corporation to inform them as to the reception of said letter, and of his interview with the said Cameron, and of his reception of fifteen dollars per share for said stock, and that it was fraudulent on his part to sign the said escrow agreement, whereby he had promised to sell his stock for five dollars per share, when, in fact, he had received said letter, and expected to receive fifteen dollars per share for said stock, and it was fraudulent on his part to conceal the fact that he had received said letter."

It is quite apparent that thus is presented an entirely different story from that set forth in the complaint. It is sufficient to say that the so-called fraud herein does not at all involve any fraudulent representation to induce the other stockholders to pool their stock nor the actual sale of said stock for a price in excess of five dollars per share—the two essential elements that characterized the cause of action as set forth. [1] But it is well settled by a long line of decisions in this state that "the plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs." (*Kredo v. Phelps*, 145 Cal. 526, [78 Pac. 1044].)

[2] This principle would be fatal to the judgment were it not for the well-recognized rule of practice that, where a cause is tried upon the theory that a certain fact is in issue and evidence thereon is received without objection, it is too late thereafter to complain that no such issue was presented. (*Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, [147 Pac. 90]; *Howard v. Hobson Co.*, 38 Cal. App. 445, [176 Pac. 715].)

In the absence of the evidence at the trial and in view of said finding of the court, the presumption being in favor of the regularity of the proceedings, we must assume that such was the action of the parties.

[3] The question then occurs whether sufficient facts are found to justify a judgment against appellant for fraud? In relation thereto the first thing that challenges attention is that the other stockholders in their agreement to sell their stock were not influenced by any representations of appellant. He did not deceive them in any way and he made no effort to persuade or induce them to pool their stock for the purpose of sale at the price of five dollars per share. The proposition was presented to them by Martin, who was interested in the transaction primarily for the reason that he hoped to sell to said vendee other interests closely connected with the property of the Lost Hills Mining Company. The court finds specifically that Lindemann did not know of the plans or expectations of Martin and did not aid or abet any scheme that the latter may have had in view. The situation then is simply this: L. is offered fifteen dollars per share for his stock in a certain corporation if other stockholders will sell at five dollars to the extent that the purchaser may secure twenty thousand shares. The other stockholders uninfluenced by L. are willing and agree to sell at the lower price. The question is, whether they have any claim upon the additional price or *bonus* thereafter received by L. The answer to this question depends, of course, upon the consideration whether L. sustained to the others any relation of confidence which made it his duty to disclose his prospect of a larger price. Since any active or positive fraud is negatived by the findings of the court, there remains only the possible operation of the principle of fraudulent deceit consisting of "the suppression of a fact, by one who is bound to disclose it." (Sec. 1710, subd. 3, Civ. Code.) But we have not been cited to any authority to the effect that, either as stockholder or secretary, Lindemann was under any legal obligation to disclose to the others the fact that he had received such letter from the Mercantile Trust Company, or that he afterward obtained fifteen dollars per share for his stock. It may be admitted that some men of a fine sense of honor would have done such a gracious and altruistic act, but we are simply to inquire what the law demands in a situation of this kind.

In *Ryder v. Bamberger*, 172 Cal. 791, [158 Pac. 753], it was held that even "directors and officers of a corporation have the right to purchase the shares of the stock of other

stockholders, where the transaction is free from fraud; and they are not bound to acquaint a stockholder willing to sell his stock with facts which would enhance the price of the stock, as they are only trustees for the stockholders as to the management of the corporation and not in their private dealings." Manifestly, there is less reason for holding that the secretary, who is a mere ministerial officer of the corporation, holds such relation of trust and confidence to the other stockholders as to require a disclosure of any information that he may have received in his individual capacity as stockholder.

*Hallidie v. First Federal Trust Co.*, 177 Cal. 600, [171 Pac. 431], involved an action "to compel an accounting of dividends and other proceeds realized by the purchaser, on the ground that the sale had been induced by fraudulent misrepresentations made by Enginger to Hallidie, who was acting in the transaction for California Wire Works." It was contended by appellant that, even if there was no active misrepresentation by Enginger, he was chargeable with constructive fraud because of his failure to disclose all the facts within his knowledge. The supreme court, however, said: "But the evidence did not show any such relation between the parties as to impose upon Enginger the stringent obligations of a trustee. While Enginger was a director and general manager of the Wire Cloth Company, it must be remembered that Hallidie himself was not only a director, but the president of the corporation. In negotiating for the stock, the two stood on equal terms, and neither owed the other any special duty of a fiduciary nature. This being the relation between the parties, the fact, if it be a fact, that the stock was, at the time of the purchase, worth very much more than the price paid, does not furnish a ground for setting the transaction aside."

Other cases cited announcing a similar doctrine are *Bacon v. Soule*, 19 Cal. App. 428, [126 Pac. 384]; *Hooker v. Midland Steel Co.*, 215 Ill. 444, [106 Am. St. Rep. 170, 74 N. E. 445]; *Tippecanoe County Commrs. v. Reynolds*, 44 Ind. 509, [15 Am. Rep. 245]; *Walsh v. Goulden*, 130 Mich. 531, [90 N. W. 406].

[4] Nor do we think that appellant is liable upon the theory that all signing the escrow agreement were joint adventurers. In 23 Cyc. 453, it is said: "A joint adventure does

not exist where property is pooled by the several owners to be sold at a particular price, and each contributor is to receive the proceeds of the property contributed by him."

The stockholders at all times owned their respective shares of stock severally and individually and at no time was there a joint interest either in the stock or the proceeds thereof.

The cases cited by respondents in view of their respective facts do not, in our judgment, satisfactorily meet the situation. Detailed consideration of only one of these, *Cole v. Bacon*, 63 Cal. 571, is invited by respondents as they seem to think it is "very similar to the case at bar"; but appellant aptly calls attention to the fact that therein Bacon was the avowed agent of the plaintiffs, who were stockholders in a certain corporation, and as such agent he undertook to sell the stock of plaintiffs for the highest price obtainable. He did sell said stock for two hundred and fifty thousand dollars, of which he secretly retained all except forty-seven thousand seven hundred dollars, and he falsely represented to plaintiffs that this sum was the price actually paid. The action was brought to recover the balance and a judgment in favor of plaintiffs was sustained by the supreme court. That an agent could thus defraud his principal without rendering himself legally liable to an accounting would, of course, not be urged by anyone familiar with the law. It may be added that the case here as presented by the complaint is "very similar" to *Cole v. Bacon*, *supra*, but the case as presented by the findings is quite dissimilar.

[5] We think, also, that the court erred in striking out the defense of *res judicata*. It is stated by appellant that at the trial the facts were stipulated to be as alleged in said defense.

In *Merritt v. Campbell*, 47 Cal. 542, it was held that "a judgment of dismissal, rendered upon the oral agreement of the parties in open court with a stipulation that each party pay his own costs, is a bar to another suit afterward brought upon the same cause of action." Such dismissal was declared to be equivalent to *retraxit* as known at common law, which, being "an open and voluntary renunciation of his suit in court," the plaintiff was not at liberty to renew. Respondents, however, claim that said decision is not controlling because therein "the parties appeared in court by their attorneys and orally agreed to a dismissal, each party



to pay his own costs." Appellant rejoins: "Respondents evidently overlook the fact that in the case at bar the parties did stipulate in open court for the dismissal of the action and the payment of their respective costs, the same as was done in *Merritt v. Campbell*." [6] The terms of said judgment do, indeed, accord with appellant's statement, and, of course, the recitals in said judgment in the absence of evidence to the contrary are conclusive upon the parties. (*Crew v. Pratt*, 119 Cal. 139, [51 Pac. 38].)

As to *Rincon etc. Co. v. Anaheim Union Water Co.*, 115 Fed. 543, cited by respondents, appellant is justified in his comment that, first, the interpretation by a federal court of a state statute is not binding upon the state courts (*People v. Linda Vista Irr. Dist.*, 128 Cal. 477, [61 Pac. 86]), and second, that the dismissal therein was not made in open court by stipulation of the attorneys of both parties, but only on motion of defendant's counsel, and the court based its ruling upon subdivision 2 of section 581, and not upon section 582, of the Code of Civil Procedure, as was done in the *Merritt* case.

[7] Where the parties appear in open court and stipulate for a dismissal the situation is not covered by said section 581, but a judgment entered thereon is a judgment on the merits as contemplated by said section 582.

Some other questions are discussed by counsel but we deem it unnecessary to notice them specifically. As we view the matter, the findings do not support a judgment for plaintiffs but require a conclusion in favor of defendant Lindemann. When such is the case, the proper proceeding is to direct judgment for the defendant. (*Dargie v. Patterson*, 176 Cal. 714, [169 Pac. 360]; Code Civ. Proc., sec. 53.)

The judgment is reversed, with direction to enter judgment upon the findings for defendant Lindemann for his costs.

Nicol, P. J., *pro tem.*, and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 23, 1920, a majority of the Justices not having assented to the granting thereof, and Lawlor, J., and Olney, J., voting for the granting of said petition.

[Civ. No. 3347. First Appellate District, Division One.—May 25, 1920.]

H. S. CRAIG, Appellant, v. L. R. GOMES et al.,  
Respondents.

- [1] MORTGAGES—MORTGAGEE IN POSSESSION—STATUTE OF LIMITATIONS—PAYMENT OF MORTGAGE DEBT.—Where the mortgagee under a first mortgage, prior to such mortgage being barred by the statute of limitations but after a second mortgage on the property has been executed in favor of the mortgagor under the first mortgage, acquires the legal title to the mortgaged premises and enters into possession thereof, he cannot be ejected or interfered with in any manner by the mortgagor until the mortgage debt is paid, even though his mortgage has become barred.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Benj. K. Knight, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. B. Rinehart for Appellant.

Sans & Hudson for Respondents.

KOFORD, J., *pro tem.*—This appeal is on the judgment-roll, and the following statement of facts is taken from the findings:

J. L. Rankin (plaintiff's assignor) and his wife, on July 12, 1913, executed a three thousand dollar mortgage due in one year, 1914, to Lillian R. Higman. This mortgage was assigned by the mortgagee and her successors several times, and came at last, on January 5, 1914, to defendants L. R. Gomes and Mary Gomes, his wife. After the making of said mortgage Rankin and wife transferred or sold the mortgaged premises to James Lomas, his wife, and William R. Orr, and the said grantees either coincidently or later (the findings do not show which) executed to said Rankin a second mortgage on the property for fifteen hundred dollars on May 4, 1914. This is the mortgage which plaintiff, as the assignee of said Rankin and wife, foreclosed in the court below. On September 11, 1916, the Lomases and said Orr, who had purchased from the Rankins as aforesaid,

conveyed the property to defendant L. R. Gomes and Mary Gomes. Thereupon Gomes and wife were the owners of the property, and also the mortgagees in the first mortgage, and the mortgage had not then outlawed. Then on September 29, 1916, Mary Gomes transferred to her husband L. R. Gomes all her interest, both in the property as a part owner, and in the said three thousand dollar mortgage, as mortgagee. The defendant L. R. Gomes has been the owner and in possession ever since the last-named date. It is therefore to be seen that the defendant went into possession before his mortgage outlawed.

This suit by plaintiff to foreclose the second mortgage of fifteen hundred dollars was commenced shortly after the first mortgage had become barred by the statute of limitations. The decree of foreclosure provides that the first mortgage of three thousand dollars, although barred by the statute of limitations, is a first lien and prior to the lien of plaintiff's fifteen hundred dollar mortgage.

The sole question on appeal raised by plaintiff is, that the first mortgage should not have been given a priority over his mortgage on account of its being outlawed.

Plaintiff does not contend that there has been a merger, and merger is not applicable under the facts. (See *Anglo-California Bank v. Field*, 146 Cal. 644, [80 Pac. 1080], and 154 Cal. 513, [98 Pac. 267].) He contends for the application of the principle that a junior mortgagee may invoke the aid of the statute of limitations against a prior mortgage, even though the mortgagor of the prior mortgage, as between himself and the mortgagee, may have waived its protection. (*Wood v. Goodfellow*, 43 Cal. 185; *California Bank v. Brooks*, 126 Cal. 198, [59 Pac. 302]; *Brandenstein v. Johnson*, 140 Cal. 29, [73 Pac. 744].)

[1] The defendant contends for the application of the principle that a mortgagee in possession, even though his mortgage becomes barred, cannot be ejected nor interfered with in any manner by the mortgagor until the mortgage debt is paid. (*Spect v. Spect*, 88 Cal. 437, [22 Am. St. Rep. 314, 13 L. R. A. 137, 26 Pac. 203]; *Brandt v. Thompson*, 91 Cal. 462, [27 Pac. 763]; *Peshine v. Ord*, 119 Cal. 312, [63 Am. St. Rep. 131, 51 Pac. 536]; *Faxon v. All Persons*, 166 Cal. 707, [L. R. A. 1916B, 1209, 137 Pac. 919]; *Cameron v. Ah Quong*, 175 Cal. 377, 384, [165 Pac. 961].)

We think that this is the correct principle to apply here. Rankin (plaintiff's assignor) is the very man who executed the first mortgage. In morals and equity he should pay it before he is given any judgment which may result in ousting the first mortgagee. The mortgagee in possession went into possession before his mortgage became barred. The second mortgage was executed while the first was a valid subsisting first lien, not barred and not even due.

The cases relied upon by appellant do not deal with a first mortgagee in possession, and their doctrine cannot be extended to a case of this kind in violation of such plain equitable considerations as exist here. While plaintiff here is the assignee of Rankin, he has no greater rights than his assignor. Furthermore, the doctrine of the cases last cited have been extended to the assignee of the original mortgagor, and is not limited to the mortgagor himself. (*Cameron v. Ah Quong*, 175 Cal. 377, [165 Pac. 961].)

The judgment, is therefore, affirmed.

Waste, P. J., and Richards, J., concurred.

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[Civ. No. 2136. Third Appellate District.—May 25, 1920.]

THE PEOPLE, Respondent, v. FANNIE H. GODDARD,  
Appellant.

[1] RED-LIGHT ABATEMENT ACT—USE OF PREMISES FOR IMMORAL PURPOSES—CONTINUED EXISTENCE—REBUTTAL OF CODE PRESUMPTION.—In an action brought under the Red-light Abatement Act to abate a nuisance alleged to have been maintained in certain premises, the trial court having found, in accordance with the testimony of certain witnesses for the defendant, that the latter caused the persons who had been using the premises for immoral purposes to remove therefrom three days before the filing of the complaint in the action, and that at the time of the filing of the complaint there was no tenant or other person whatever occupying said premises, the presumption, declared by section 1963, subdivision 32, of the Code of Civil Procedure, "that a thing once proved to exist continues as long as is usual with things of that nature," if it

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1. Abatement of bawdy-house as nuisance, note, *L. R. A.* 1918D, 819.

applies to the existence of such a nuisance, is dispelled or overcome by other evidence.

- [2] **ID.—FINDING THAT PROPERTY IS NUISANCE—CONCLUSION OF LAW.**—In such an action, the trial court having found that on and prior to a certain date the property in question was used for the purpose of lewdness, assignation, and prostitution, and that on a subsequent date, which was prior to the filing of the complaint, the owner caused the persons so occupying and using the same to remove therefrom, a further finding that "the said upper story of said building was and now is a nuisance under the laws of the state of California," taken alone or by itself, is a conclusion of law and does not involve a finding of fact.
- [3] **ID.—EVICTION OF TENANTS—FAILURE TO REMOVE FURNITURE IM-MATERIAL.**—In such an action, the trial court having found that the owner, upon learning the use to which her property was being put, caused the persons so occupying and using the same to remove therefrom, its further finding that the furniture in said building at and during the time the nuisance was being maintained therein was not removed from said premises at the time those using them for immoral purposes were compelled by the owner to vacate the building, possesses no significance as proving the continued maintenance of the nuisance.
- [4] **ID.—INCONSISTENT FINDINGS—REVERSAL OF JUDGMENT.**—In such an action, where there are irreconcilably inconsistent findings upon a particular ultimate fact, such as the fact of the continued existence of the nuisance at the time of the commencement of the action, a judgment or decree in favor of the people so predicated cannot be upheld.
- [5] **ID.—GOOD FAITH OF OWNER IN EVICTING TENANTS—EVIDENCE—UNSUPPORTED FINDING.**—In this action brought under the Red-light Abatement Act to abate a nuisance alleged to have been maintained in certain premises, the defendant having shown that immediately upon learning through a newspaper article of the use to which her premises were being put, she caused the females who were conducting the premises for immoral purposes to be evicted therefrom, and the prosecution having introduced no testimony tending to show that the closing of the place by the owner was not done in good faith, a finding that the act of the owner, in evicting therefrom the parties who were using it for immoral purposes, was not done in good faith for the purpose of permanently abating said nuisance, is unsupported.
- [6] **ID.—ABATEMENT OF NUISANCE PRIOR TO SUIT—DISMISSAL OF ACTION.**—Where a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves prior to the commencement of the action, the further prosecution of the action cannot be maintained and the action should be dismissed.

APPEAL from a judgment of the Superior Court of Sacramento County. C. O. Busick, Judge. Reversed.

The facts are stated in the opinion of the court.

R. Platnauer for Appellant.

Hugh B. Bradford, District Attorney, for Respondent.

HART, J.—The action was brought under the Red-light Abatement Act to abate a nuisance alleged to have been maintained in premises in the city of Sacramento owned by the defendant. It was decreed that defendant be perpetually enjoined from conducting said premises “for the purpose of acts of lewdness, assignation, and prostitution” and the premises were ordered closed for the period of one year. Defendant appeals from the judgment.

The contention of appellant that the judgment is not sustained by the findings and that the evidence is insufficient to sustain the findings may be considered together.

The court found (finding III): “That on, and for a long time prior, to the 13th day of September, 1917, said real property herein described, together with the upper story of the building situate and erected thereon, was, during all of said time, used for the purpose of lewdness, assignation and prostitution, and the said upper story of said building was and now is a nuisance under the laws of the state of California. . . . V. That on or about the 17th day of September, 1917, said respondent was informed, through a newspaper, said premises were being used for immoral purposes, and she caused the persons so occupying the same to remove therefrom on September 25, 1917, but that the furniture in said premises still remained therein and had been in said premises for a period of nearly two years prior to the commencement of this action. That said complaint in this action was filed on the 28th day of September, 1917; that at the time of filing said complaint there was no tenant or other person whatsoever occupying said premises. VI. That the removal of the tenant from said premises was not made in good faith by said respondent for the purpose of permanently abating said nuisance.”

The evidence may briefly be summarized as follows: Edwin E. Grant, executive officer of the State Law Enforcement and Protective League, an organization formed for the purpose of aiding officers in the enforcement of the law, particularly the laws against commercialized vice, and S. C. Barker, an employee of said league, testified that on the evening of September 13, 1917, they visited the premises in question; that they saw three girls there who were dressed in loose-fitting house dresses and there were three or four drunken men lolling around; that beer was being served and witnesses bought some; that they asked two or three different girls "what their price was and in each case the girl answered one dollar and one-half a trick"; that Barker said: "We are interested in staying all night; what is your price for all night?" to which one of the girls answered, "Ten dollars," and further said, "Don't come back before 1 o'clock as we are busy right up until then." Witness Barker said that the word "trick" was "a polite term for sexual intercourse." Two police officers testified that the general reputation of the premises was that it was used as a house of prostitution.

A. E. Goddard, a son of the defendant, testified that he acted for his mother in connection with her property; that he read an article in the "Sacramento Union" of September 17, 1917, regarding an affidavit made by Grant to the effect that the property in question was used as a house of prostitution; that he immediately notified Mr. George Locke, the tenant of the property, to have the people vacate if it was used for purposes of that kind and that he visited the district attorney and told him that their instructions to their agent had been under no circumstances to rent the premises as a house of prostitution; that the people occupying the premises immediately moved out; that he visited the premises that evening and found only a Chinese caretaker there; that he saw Mr. Locke several times after that and that Mr. Locke assured him the place was closed. George Locke testified that immediately after Mr. Goddard called upon him he told the tenants to vacate and that they did vacate the premises before September 25, 1917. The witness owned the personal property on the premises and testified that, on the date of the trial, November 15, 1917, it was still there. A witness who had charge of the renting of the premises testified that they were occupied from September

7th until September 25th and that they became vacant on the latter date.

The people presented no testimony showing or tending to show, other than the inference which might be drawn from the testimony that acts of prostitution and lewdness were carried on in the building in question on and prior to the thirteenth day of September, 1917, that subsequent to the date just mentioned acts prohibited by the abatement act were committed in said building or that the building was used subsequent to said date for purposes of assignation or prostitution or that acts of lewdness were practiced therein. But it is the position of the people that, inasmuch as it would be practically impossible in most of such cases as the one here to show that acts of prostitution or of assignation or of lewdness were practiced in a building at the very instant that the complaint is filed, the presumption "that a thing once proved to exist continues as long as is usual with things of that nature" (subd. 32, sec. 1963, Code Civ. Proc.) applies, and that it was, therefore, not necessary to make affirmative or direct proof or for the court to find that at the time of the commencement of the action the immoral acts mentioned were carried on in the building. (See *People v. Macy*, 43 Cal. App. 479, [184 Pac. 1008].) The presumption referred to is a mere rule of evidence and will stand as evidence, where applicable, only where it is not overcome by other evidence, and, conceding that it applies in such a case as this or does not run counter to the presumption declared in subdivision 33 of section 1963 of the Code of Civil Procedure, to wit, "That the law has been obeyed," the answer to the contention is that there was introduced by the appellant testimony which appears to have been, in the judgment of the court, of sufficient probative power to overcome the force or effect of the presumption relied upon by the people. The uncontradicted testimony of the agent and the original lessee of the building is that they, having read on September 17, 1917, in the "Sacramento Union," a morning newspaper, of an affidavit filed with the district attorney of Sacramento county by the executive officer of the State Law Enforcement and Protective League, charging that the premises in question were being used for the immoral purposes prohibited by the Abatement Act, immediately proceeded to take steps looking to the closing of the place and that, on the



twenty-fifth day of September, 1917, they succeeded in causing, and did cause, the inmates of the building to be evicted and closed the place, and that from and after that date down to the date of the trial of this action, which was commenced on the fifteenth day of November, 1917, the building or the upper portion thereof complained of by the said executive officer had not been occupied or used for any purpose, except for the storing of the furniture used by the parties charged with conducting the premises in contravention of the mandates of the statute. [1] The trial court evidently believed the testimony of the witnesses, Goddard and Locke, the agent of the owner and the original lessee, respectively, of the building, for it found that the owner of the building, having been informed on the seventeenth day of September, 1917, that the upper story was being used for immoral purposes, caused the persons *so occupying* the same to remove therefrom on September 25, 1917, three days before the complaint invoking the injunctive power of the court against the building as a nuisance was filed, and that "at the time of the filing of said complaint there was no tenant or other person whatever occupying said premises." And it is upon this finding that we base the above declaration that the presumption "that a thing once found to exist continues as long as is usual with things of that nature," if it applies at all to the fact that a nuisance such as the one complained of here, which is itself a crime (Pen. Code, sec. 372), has been proved to have existed or to have been maintained at some time in the past, was dispelled or overcome by "other evidence." (Code Civ. Proc., sec. 1963.)

Of course, we are not to be understood as holding that in all cases brought under the Abatement Act it is necessary, to sustain the complaint, that immoral acts which constitute the nuisance under said statute must be directly or affirmatively shown to have been committed in the place down to the very time of the filing of the complaint. We simply hold here that there is a positive finding that, before the filing of the complaint, the place had been closed to immoral practices.

We are now brought to the consideration of the question whether the findings support the decree.

[2] As we have seen, the action was commenced by the filing of a complaint on the twenty-eighth day of September, 1917, and finding No. 3 is the only finding which contains

anything respecting the commission of acts of lewdness, etc., in and upon the premises. Said finding is:

"That on, and for a long time prior, to the thirteenth day of September, 1917, said real property herein described, together with the upper story of the building situate and erected thereon, was, during all of said time, used for the purpose of lewdness, assignation and prostitution, and the said upper story of said building was and now is a nuisance under the laws of the state of California."

On the other hand, as has been shown, the court found, in finding No. 5, that having been informed on the seventeenth day of September, 1917, that said premises were being used for immoral purposes, the owner caused the persons so occupying and using the same to remove therefrom on September 25, 1917, etc.

It is very clear that the finding that "the said upper story of said building was and now is a nuisance under the laws of the state of California," taken alone or by itself, is a conclusion of law and does not involve a finding of fact; but, if it were deemed necessary to concede that, in the connection in which it is employed, it might justly be held to constitute a finding of an ultimate fact, it is nevertheless plainly manifest that it is wholly inconsistent with finding No. 5. It is obvious that if, as the court found, the owner of the building, on receiving information that the upper story thereof was being used for immoral purposes, caused the persons so using it to be removed therefrom before the filing of the complaint herein, the nuisance complained of was abated by the act of the owner herself before legal proceedings against her and the building under the Abatement Act were instituted. This is at least necessarily and indeed, the only rational inference following from said finding. [3] That portion of said finding that the furniture in said building at and during the time the nuisance was being maintained therein was not removed from said premises at the time those using them for immoral purposes were compelled by the owner to vacate the building possesses no significance. Neither the furniture nor the building itself constituted the nuisance complained of. It was the manner in which and the purpose for which both were used that constituted the nuisance, and if those using the furniture and the building for immoral purposes were evicted there-

from or from the upper story, where the nuisance was being maintained, was closed to those persons and all other persons desiring or intending to use them for the same purposes, how could the nuisance be further maintained? The answer to this question is too obvious to require further consideration of the proposition.

But we are still of the opinion that the alleged finding that the building "now is a nuisance" is a conclusion of law, notwithstanding the connection in which it is used. In the initial portion of the finding (and, as stated, said finding is the only one of the several findings which finds that acts of lewdness, etc., had been practiced on and in the premises), it is found that the upper story of the building was, not down to the filing of the complaint, but "on, and for a long time prior to, the thirteenth day of September, 1917, used for the purposes of lewdness, assignation and prostitution," etc. This finding does not support the conclusion or the finding, if such it might properly be called, that the place "now is a nuisance under the laws of the state of California."

[4] It follows that, in any view of the findings, the decree cannot stand. Where there are inconsistent findings upon a particular ultimate fact—that is, where the findings are irreconcilably inconsistent, as would be true here as between finding No. 5 and that portion of finding No. 3 to the effect that the building is now a nuisance, assuming that the latter is a finding of fact and not a conclusion of law—a judgment or decree, so predicated, cannot be upheld. It cannot in such case be determined upon which of the findings it was intended that the judgment should rest. The judgment may safely rest on one or the other, taken alone, if it be consistent with the finding, but it is very clear that it cannot rest on two findings in irreconcilable opposition to each other as to the same fact. And with the conclusion, stated as a finding, that the building "now is a nuisance," eliminated as a finding of fact, there is left no finding upon which the decree can rest.

[5] It is contended, however, that the finding that the act of the owner of the building in evicting therefrom the parties who were using it for immoral purposes was not done "in good faith for the purpose of permanently abating said nuisance," destroyed whatever force there may be in the

finding, which we hold establishes or finds the fact that the nuisance had been abated by the owner prior to the filing of the complaint, that the females who were conducting the premises for immoral purposes were evicted therefrom as indicated in said finding. This contention would no doubt possess much force if there was any evidence to support the finding of want of good faith on the part of the owner in causing the female inmates of the building to vacate it. As seen, the only testimony presented by the people is to the effect that the building, or the upper story thereof, was used for immoral purposes on and prior to the thirteenth day of September, 1917. The testimony introduced by the defense (and it is not contradicted, so far as the face of the record discloses) is that the son and agent of the owner, upon learning of the complaint made against the building, immediately went to the office of the district attorney and stated to that officer that "our instructions to our agent had been under no circumstances to rent it for a house of that kind; that I told him the people moved out immediately—we had ordered to have it vacated"; that he went to the premises after the order to vacate was made and that the women had all left the house, and that there was no one remaining in the upper story but a caretaker in the person of a male Chinese. He further testified that he met a police officer whose "beat" embraced the district in which the building is situated, and said to the officer "that if there is anything like that going on, we had given instructions that the house be cleaned out, be closed, just as soon as they could get their things out of there. As I understand, Mr. Locke said it had been closed, because I went to see Mr. Locke several times after that, and he assured me the place was closed." The witness, Locke, for the defense, corroborated Goddard as to the instructions given to him by the latter that the building should not be used for immoral purposes and as to the eviction of the female inmates and the closing of the place as above indicated.

It would thus seem very clear that the owner and her agent acted in perfect good faith in causing the place to be vacated and closed to the immoral purposes for which it had previously been used. This proposition becomes the more clearly apparent from the fact that the people introduced no testimony tending to show that the closing up of the place

by the owner was not done in good faith—that is, that there were any act or acts on the part of the owner or the agent or lessee of the building to permit it to be reopened for use for immoral purposes. The case of *State v. Jerome*, 80 Wash. 261, [141 Pac. 753], cited by the district attorney on the question of good faith is not in point here. In that case the female who had conducted a house of prostitution on the premises there in question and another female prostitute were still occupying the premises, not owned but under lease by one of them, when the action to suppress the nuisance was commenced, although there was no proof of actual acts of prostitution having been practiced in the house from the twenty-ninth day of June, 1913, when both women were arrested for practicing acts of prostitution, and the thirtieth day of June, 1913, when the complaint that the house was being maintained as a nuisance by the women was filed. Quite clearly, the fact that the women themselves remained in the house after it was claimed that they had ceased carrying on the business of prostitution therein constituted a circumstance from which the court could well draw the inference that immoral acts were still being committed in the place subsequent to the time that it was claimed that the nuisance was abated by the female inmates themselves. And the court, in that case, with apparent justness, held that, although some of the furniture had been removed from the building and the conditions therein generally changed to some extent, it was for the trial court to determine upon the whole evidence whether the house in good faith had been closed as one of prostitution, and refused to disturb the decree authorizing the sale of the furniture and enjoining the further use of the premises for any purpose for the period of six months. It is hardly necessary to repeat that in this case the women were all driven out of the place by the owner of the building through her agents before the complaint was filed, although, as seen, the furniture, which was not the property of the owner of the building but belonged to Locke, the original lessee, had not then been removed therefrom.

The decree herein enjoins the use of the building for any purpose for the period of one year, and it seems to us that in a case of this character, where, as here, the question whether so severe and drastic a penalty should be visited upon

the owner of real property turns upon the proposition of good faith—that is, whether the owner himself has in good faith abated the nuisance, with the intention that it shall remain abated for all time, before a complaint looking to the suppression of the nuisance theretofore maintained in and on the premises has been filed—a finding of want of good faith in such case should be supported by evidence clear, satisfactory, and convincing. The testimony presented by the people does not, in our opinion, make out such a case, while that of the defendant, as we have before said, appears to disclose perfect good faith in closing the place as it had been immorally maintained and an intention of permanently closing it as a house of assignation and prostitution or in which lewd conduct is practiced. The uncontradicted testimony of the owner's son, who was acting as the agent of the building, that he told a police patrolman of the particular district in the city in which the house is located that he desired that a stop should be put to any attempt to use the premises for immoral purposes is very strong evidence of the good faith of the owner in causing the building to be vacated by the women who had previously used it for purposes of prostitution and assignation, etc.

[6] It is, of course, well settled—indeed, it is but the statement of a rule necessarily following from the very logic of such a situation—that, where a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves charged with maintaining the nuisance or otherwise prior to the commencement of the action the further prosecution of the action cannot be maintained and the action should be dismissed, for the very obvious reason that there is then nothing existing against or upon which the injunctive process of the court can or will operate. (Joyce on Nuisances, sec. 486, p. 704; 2 Wood on Nuisances, 3d ed., sec. 864; *McCarthy v. Gaston Ridge Mill Co.*, 144 Cal. 542, 547, [78 Pac. 7]; *Gilbert v. Peck*, 162 Cal. 54, 55, [Ann. Cas. 1913C, 1349, 121 Pac. 315].) And this rule, of course, applies as well to cases arising under the Red-light Abatement Act as in other cases of nuisances. (See *People v. Dillman*, 37 Cal. App. 415, [174 Pac. 951]; *People v. Burch*, 46 Cal. App. 391, [189 Pac. 716]; *State v. Jerome*, 80 Wash. 261, [141 Pac. 753].)

We conclude that the judgment should be reversed, but do not feel justified in ordering, as the counsel for the appellant requests us to do, the court below to enter judgment in favor of the appellant upon the findings as they appear in this record. Another trial might bring forth other and additional proof upon the question whether the nuisance was in good faith abated by the owner of the building, which would support a finding of want of good faith.

The judgment is reversed.

Burnett, J., and Nicol, P. J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 26, 1920, and the following opinion then rendered thereon:

THE COURT.—A majority of the justices not having assented to the granting of a hearing of the above-entitled cause in this court after decision by the district court of appeal of the third appellate district, it is deemed proper to say that the view of those opposed to the granting of such petition is that the district court of appeal opinion recognizes that a mere sham abatement of the nuisance prior to action would not be a defense, and that in so far as this feature of the case is concerned, the reversal was for want of evidence to sustain the finding of lack of good faith, and that upon the face of the opinion no error appears in this regard.

The application for a hearing stands denied.

Lawlor, J., and Olney, J., voted for a hearing in the supreme court.

[Civ. No. 2134. Third Appellate District.—May 26, 1920.]

A. MALOOF, Respondent, v. ONA M. DAVIS et al.,  
Appellants.

[1] **BROKERS — PROCURING CAUSE OF SALE — CONSUMMATION THROUGH ANOTHER.**—When an agent takes a prospective purchaser upon land which he has been authorized in writing by the owner to offer for sale and to sell, introduces such purchaser to the owner and succeeds in awakening his interest in the property, and the purchaser expresses a tentative or conditional purpose to buy the land, and a short time thereafter he does purchase it, the trial court is justified in concluding that such agent's efforts were the procuring cause of the sale, or at least that the sale "was made by, through, or upon information received through such agent"; notwithstanding the sale is consummated through another agent.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. L. Thompson for Appellants.

Kellogg & Kyle for Respondent.

BURNETT, J.—The action was for compensation for securing a purchaser of real estate belonging to defendants. The written contract, executed by the parties, upon which the action was brought, as far as necessary to quote was in the following language: "I hereby authorize A. Maloof, as my agent, for a term of — days from this date, and hereafter until notified by me in writing that the same is withdrawn (this is not exclusive), to offer for sale and sell for me for the sum of \$35,000, my real property [describing it]. And I further agree that if my said agent shall procure a buyer for said property, or if a sale or exchange is made by, *or upon any information received through such agency*, whether such sale or exchange be made before or after the expiration of this agreement, at the above or any other

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1. When broker is considered as procuring cause of sale, note, 44 L. R. A. 321.



amount named or accepted by me, I will pay to said agents Five Per Cent of such selling price, as a commission and compensation for such services." The court found that "the plaintiff interested one John Greott in the purchase of said property . . . and, thereafter, the said defendants sold said ranch property to said John Greott and accepted and received from him, in payment thereof, the sum of thirty thousand dollars . . . That the said buyer of property, to wit, John Greott, was procured by plaintiff, and said sale to said John Greott was made by and upon information received by said defendants from plaintiff." The foregoing findings present the only questions that are in controversy between the parties. In fact, during the progress of the trial the learned counsel for appellants declared, "I suppose the only question in this case is, was Mr. Gray or Mr. Greott the purchaser," and subsequently he said, "Of course, the real issue in this case is what was the procuring cause of the sale; that is the real question in this case." The record contains evidence of these facts as substantially stated by respondent: After the execution of this contract, and before any written notice of its withdrawal, plaintiff took several persons out to look at the property in an endeavor to interest them as buyers. Finally he did interest one John Greott, took him and his wife out to inspect the property in person, introduced them to the defendants as being possible purchasers and spent with them two or three hours while they examined and talked with the defendants about the entire property. Greott liked the place and was very much interested in it, but having already an offer outstanding for another place said he would make no offer until he heard from that, when he would talk business, would let them know and would make them an offer. Within a short time afterward plaintiff saw Greott twice and each time was advised that Greott had not yet found out about his offer for the other place, and was not ready to talk business concerning the purchase of this. While plaintiff was still waiting for Greott to answer, he evidently learned that he was not to get the other place, and the transaction occurred by which the defendants conveyed their property to Greott by deed dated April 19, 1919, and on the same day taken by Greott himself to the recorder's office, and there recorded. Thereupon plaintiff sought out Greott and inquired why he had

bought defendants' place from other agents and he replied that it was because he could get it cheaper from Gray, the real estate agent with whom the property had been listed by defendants. Respondent thereupon went to one of the defendants and demanded his commission on account of the sale to his customer and was informed that appellants had obtained a contract from Gray that they should have no commission to pay and if any was paid it was up to Gray. Greott paid the entire purchase price of \$30,000, which was accepted by defendants, in the form of three personal checks, one April 12, 1919, for \$5,000; two on April 19, 1919, the date of the execution and delivery of the deed, one for \$12,640 and one for \$12,360.

Of course, we are not concerned with the fact that evidence was introduced on behalf of appellants to the effect that one Gray was the real purchaser of the property and that the deed was taken in the name of Greott to secure him for the purchase price, which he advanced. It is sufficient for us to say that the court's conclusion to the contrary finds in the record sufficient legal support. Moreover, according to the testimony of Mr. Gray, he and Mr. Greott were partners in the transaction; in other words, the purchase was made by and for the benefit equally of both of them. Upon this theory the participation of Greott in the purchase is sufficient, in a legal sense, to satisfy the requirement that the purchaser must be one secured by the agent.

The question whether the efforts of the agent were the procuring cause of the sale must be resolved in favor of the finding of the court, since such is a rational inference from the showing made. [1] When an agent takes a prospective purchaser upon the land, introduces him to the owner, and succeeds in awakening his interest in the property, and the purchaser expresses a tentative or conditional purpose to buy the land, and a short time thereafter he does purchase it, no surprise should be occasioned if a court concludes that the agent's efforts were the procuring cause of the sale, or at least that the sale "was made *by, through, or upon information received through such agent.*"

Appellants have treated us to an interesting and instructive discussion of the principles governing brokers' commissions, but they are familiar to the profession and have been often considered by this and other appellate courts of the

state, and we deem further consideration of them unnecessary.

The question here is one of evidence, and, since there is no legal objection to the validity of the contract made by the parties and we are satisfied that there is support for the conclusion of the trial judge that plaintiff fully executed the terms and conditions of said contract entitling him to the compensation therein provided, we need to go no further.

The judgment is affirmed.

Nicol, P. J., *pro tem.*, and Hart, J., concurred.

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[Civ. No. 3393. First Appellate District, Division One.—May 26, 1920.]

EVA F. RICHMOND, Appellant, v. HELEN V. DENNY,  
Executrix, etc., et al., Respondents.

- [1] **RESTORATION OF RECORDS—DIVORCE ACTION—ALIMONY PROVISION—INSUFFICIENCY OF EVIDENCE—JUDGMENT.**—Upon an application for the restoration of the record in a divorce action, the court, if not fully satisfied from the evidence adduced in support thereof that the provision for alimony, alleged to have been a part of the original decree of divorce, correctly expresses the order previously made by it, is justified in refusing to direct the restoration of the record to the extent of including it.
- [2] **ID.—DATE OF DIVORCE—REFERENCE TO RECORD OF TITLE COMPANY.** In such a proceeding it is not error to refuse to allow a witness to testify regarding the date of the divorce action from a record of a title company, where such record was not made by her or under her direction.
- [3] **ID.—SERVICE OF SUMMONS—HEARSAY EVIDENCE.**—In such a proceeding, testimony of the wife that she knew her husband, the defendant, was served with summons in the divorce action at a given place, if based on hearsay, is properly excluded; and it is not error to refuse to permit her counsel to show by tests of her recollection that she has a remarkable memory.
- [4] **ID.—KNOWLEDGE OF DEFENDANT OF DIVORCE ACTION—CONVERSATIONS WITH PLAINTIFF IMMATERIAL.**—In a proceeding to restore the records in a divorce action, testimony of the plaintiff as to conversations had by her with the defendant subsequent to the divorce action, if offered for the purpose of showing that the de-

fendant was personally served at a given place, that he knew a divorce had been granted, and that he knew the amount of the permanent maintenance, is immaterial and properly excluded.

[5] *Id.*—NEW TRIAL UNAUTHORIZED.—In a proceeding for the restoration of lost or destroyed records, a new trial is unauthorized.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to restore a lost record in conformity with plaintiff's application. John Hunt, Judge. Affirmed.

The facts are stated in the opinion of the court.

Louis P. Dunkley and George F. Owens for Appellant.

Jas. P. Sweeney and Frank J. Fontes for Respondents.

WASTE, P. J.—This is an appeal from a judgment, or order, of the trial court refusing to restore a lost or destroyed record, in conformity with appellant's application for restoration of the records in the case of *Eva F. Denny v. Orion O. Denny*, a divorce action instituted by the appellant against her husband, since deceased, in 1884, the record of which was destroyed in the conflagration of April 18, 1906. The court found, in substance, and restored the complaint, the summons, service of which was made and default entered, the findings, and the decree of divorce. It refused to incorporate in the decree an alleged provision granting the plaintiff the sum of \$250 per month as and for permanent alimony, for the maintenance and support of plaintiff alone, commencing September 1, 1884. The restoration of the decree of divorce as presented would have laid the foundation for a judgment in favor of the petitioner, which could have been made the basis of a claim against the estate of the deceased.

The lower court found that "in view of the impecunious condition of the defendant [the deceased husband] in said action at the time of said trial, as disclosed by the evidence herein, that no such amount as the sum of \$250 per month was awarded to plaintiff for the support of herself alone; . . . That, at the time of the destruction of said records by fire, the said Eva F. Richmond (formerly Eva F. Denny) was a resident of the city and county of San Fran-

cisco; that, in failing to apply for the restoration of said record for more than thirty-two years since the date of said decree of divorce, and more than ten years after the destruction of the records herein, and more than six months after the date of the death of said Orion O. Denny, the said Eva F. Richmond, formerly Eva F. Denny, was guilty of laches, in allowing an unreasonable length of time to elapse before the filing of said petition herein, thus rendering uncertain and unsatisfactory to the court the testimony offered as to the contents of the proposed record."

The act providing for the restoration of lost or destroyed records provides, in part: "... If, upon such hearing the court shall be satisfied that the statements contained in such written application are true, the court shall make an order reciting what was the substance and effect of such lost, injured or destroyed judgment. . . ." (Stats. 1906 (Ex. Sess.), p. 73, sec. 2.)

While the attorney of record for the plaintiff in the divorce action testified that, to the best of her recollection, the complaint prayed for, and the decree contained a provision awarding \$250 to the plaintiff as her permanent alimony, the contradicted testimony of the plaintiff was that she testified, upon the trial of the divorce action, that her husband had no business or occupation; that his father put him in business in Seattle; that he did not "make good"; that she and her husband were living upon the bounty of defendant's father; that the largest amount that the defendant had ever received from his father, as an allowance, was \$150 per month; and that these facts were true. There was, therefore, sufficient warrant for the court's action in holding the evidence unsatisfactory, and in refusing to include the alimony provision in the decree as restored, and ample justification for the remark of astonishment of the trial judge, the same one before whom the action was tried some thirty-two years ago, that he, "having heard that the man was only getting \$150, ordered him to pay \$250."

[1] The lower court, not being fully satisfied from the evidence adduced in support thereof that the provision for alimony, alleged to have been a part of the original decree of divorce, correctly expressed the order previously made by it, was justified in refusing to direct the restoration of the record, to the extent of including it. (*Kaufman v. Shain*,

111 Cal. 16, 21, [52 Am. St. Rep. 139, 43 Pac. 393].) Regardless of the question of the effect of the long delay in making the application, and the strong inference thereby arising, the failure of the petitioner to satisfy the lower court as to the contents of the destroyed decree was fatal to her cause.

Certain errors complained of by the appellant may be briefly disposed of. The objection that the executrix and executors of the estate of the deceased defendant in the state of Washington were allowed to appear and defend the action was expressly waived in the court below, and no motion was made to strike out their answer, the verification of which, by the attorney for the defendants, complied with the requirements of the code.

[2] It was not error to refuse to allow the witness, Mrs. Foltz, to testify regarding the date of the divorce action from a record of the Title Guaranty and Trust Company, which was not made by the witness, or under her direction.

[3] The evidence of the plaintiff that she knew her husband, the defendant, was served with summons in the divorce action in San Francisco, was based on hearsay, and was properly excluded. Neither was it error to refuse to permit plaintiff's counsel to show by tests of her recollection that she had a remarkable memory.

[4] The appellant urges as one of the grounds of her appeal that the court erred in refusing to allow the plaintiff to testify as to conversations had by her with the defendant subsequent to a divorce action, for the purpose of showing that he was served personally in the city and county of San Francisco, that he knew a divorce had been granted, and that he knew the amount of the permanent maintenance, and the other facts contained in the decree of divorce. On this ground the evidence was immaterial in a proceeding to restore the lost record, and was properly excluded, regardless of the other reasons urged by respondents in their objections, and which seem to have been favored by the lower court. The claim that the rejected testimony would have had some bearing on the matter of laches of the petitioner appears to be an afterthought. Such contention was not made in the lower court.

The alleged facts as to the contents of the destroyed documents were fairly presented by the amended petition for the

restoration, and the action of the court in not permitting certain minor amendments was not prejudicial to the rights of the petitioner. [5] The motion for a new trial was properly denied. No statutory provision has been called to our attention permitting a retrial of the limited, and special, proceedings provided for the restoration of lost or destroyed records.

The order is affirmed.

Richards, J., and Welch, J., *pro tem.*, concurred.

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[Crim. No. 502. Third Appellate District.—May 26, 1920.]

THE PEOPLE, Respondent, v. VICTOR RICCOMINI et al.,  
Appellants.

[1] CRIMINAL LAW—BURGLARY—EVIDENCE—VERDICT—INSTRUCTIONS—LACK OF PREJUDICE.—In this prosecution of certain defendants charged, by an information, with having entered a store with intent to commit the crime of larceny, the evidence was sufficient to justify the verdict of guilty, the law was correctly stated to the jury, and no error prejudicial to the defendants was committed.

APPEAL from a judgment of the Superior Court of Sacramento County. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Roy Lewis and B. E. Gaddis for Appellants.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

HART, J.—The clerk's and reporter's transcripts in this case were filed in this court on December 27, 1919. The case was regularly placed on the April, 1920, calendar and, when called, counsel for appellants requested and were granted thirty days' time in which to file an opening brief. Such time having expired without the filing of a brief and no extension of time having been requested or granted, the case is now ordered submitted upon the record.

[1] By an information filed in the superior court by the district attorney of Sacramento County, defendants were charged with having, in September, 1919, entered the store of O. Morelli, in the city of Sacramento, with intent to commit the crime of larceny. Defendants were jointly tried, the jury found them guilty, and they were sentenced by the court to imprisonment in the state prison.

We have carefully examined the record and are satisfied that there was sufficient evidence to justify the verdict of guilty. The law was correctly stated to the jury by the court and we discover in the record no error prejudicial to the defendants.

The judgment is affirmed.

Nicol, P. J., *pro tem.*, and Burnett, J., concurred.

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[Civ. No. 3283. Second Appellate District, Division One.—May 27, 1920.]

MRS. ROSE D. MITCHELL, Respondent, v. MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK (a Corporation), Appellant.

[1] FIRE INSURANCE — PRELIMINARY PROOF OF LOSS — ACCEPTANCE OR OBJECTION TO BY COMPANY — WHEN LOSS PAYABLE — PREMATURE ACTION.—Where a fire insurance policy provides in effect that the company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof it shall notify him in writing of its partial or total disagreement with the amount of loss claimed by him, and that all loss shall be payable thirty days after the amount thereof has been ascertained, the company is entitled to a period of twenty days within which to accept or object to the amount of loss claimed by the insured in his preliminary proof of loss and, in the absence of any objection made, the loss becomes payable thirty days after the expiration of such twenty days, and an action brought before the expiration of that period is instituted prematurely.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Reversed.

The facts are stated in the opinion of the court.



W. W. Hindman for Appellant.

Duke Stone for Respondent.

CONREY, P. J.—Action to recover for loss incurred by fire and covered by a fire insurance policy issued to the plaintiff by the defendant. Judgment in favor of the plaintiff, from which the defendant appeals.

[1] It was provided in the policy that "this company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, . . . the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him . . ." Further provision was made for appraisal in case of disagreement of the parties as to the amount of loss. It was further provided: "Loss when payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisal; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt." The complaint alleged that on or about March 19, 1919, the plaintiff furnished the defendant with her proof of loss, and that the defendant refuses to pay the same and has not paid the same or any part thereof. The complaint is silent as to any notice of disagreement as to the amount of loss, or any appraisal or attempt to obtain an appraisal.

The defendant demurred to the complaint on the ground that the complaint did not state a cause of action, and that demurrer was overruled. Thereafter the defendant filed its answer in which it was denied "that any sum or sums of money were due, owing or unpaid by the defendant to the plaintiff at the time of the commencement of this action, or at any other time or at all." The court found that "on March 19, 1919, and within the time and terms provided by said policy, plaintiff furnished the defendant with her proof of loss; but that defendant has at all times refused to pay the plaintiff any sum whatever under said policy; and that in truth and in fact by reason of said loss that the defendant became liable to pay the plaintiff the said sum of three

hundred fifty (\$350) dollars, being the reasonable value of the furniture and personal effects so destroyed."

On the record thus produced, consisting of the judgment-roll alone, it appears that the action was instituted prematurely. The complaint was filed on May 5, 1919, which was only forty-eight days after the preliminary proof had been furnished by the plaintiff to the defendant. The defendant was entitled to a period of twenty days within which to accept or object to the amount of the loss as claimed by the plaintiff. In the absence of any objection made, the company was "deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss"; in other words, the amount was thus ascertained by agreement. Under those circumstances, the loss became payable in thirty days from the expiration of the twenty days. No right of action could accrue until the expiration of that period of thirty days. In *Borger v. Commercial Fire Ins. Co.*, 24 Cal. App. 696, [142 Pac. 115], the action appears to have been based upon the same form of policy as that before the court in the case at bar; the complaint was subject to similar defects, and it was held that the action having been commenced within less than thirty days after the expiration of twenty days from the presentation of the proofs of loss, the action was prematurely brought. On that ground the judgment was reversed. On the authority of that decision, and without discussing the other ground of appeal relied upon by appellant, the judgment is reversed.

Shaw, J., and James, J., concurred.

[Civ. No. 3244. First Appellate District, Division One.—May 27, 1920.]

**A. ROSS, Appellant, v. SAN FRANCISCO-OAKLAND  
TERMINAL RAILWAYS COMPANY (a Corporation),  
et al., Respondents.**

- [1] **EVIDENCE—SUFFICIENCY OF TO PROVE FACT—SUBMISSION OF QUESTION TO JURY—WHEN NOT NECESSARY.**—In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture, or surmise, that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. When the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.
- [2] **ID.—WHEN DIRECTED VERDICT PROPER—CONFLICT IN EVIDENCE.**—A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence; and to warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one.
- [3] **NEGLIGENCE—COLLISION BETWEEN STREET-CAR AND PEDESTRIAN—RES IPSA LOQUITUR.**—The doctrine of *res ipsa loquitur* has no just or proper application to the case of a collision between a street-car and a pedestrian on the street.
- [4] **ID.—RECIPROCAL DUTIES OF STREET-CAR COMPANY AND PEDESTRIANS—BREACH—RESPONSIBILITY.**—The duties of a street-car company and its motorman upon approaching an intersecting street and of a pedestrian about to cross the tracks at such intersection are reciprocal, and each is required to approach the crossing with due regard for the rights of the other, and if either fails to observe the care required, it is negligence for which the guilty party is responsible.
- [5] **ID.—CROSSING OF HIGHWAY IN FRONT OF APPROACHING CAR—PROPRIETY OF CONDUCT—QUESTION FOR JURY.**—If, in view of his distance from an approaching street-car, the rate of its speed and all other circumstances of the event, a reasonably prudent man would

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4. Duty of driver of street-car to anticipate attempt of pedestrian to cross track, note, *Ann. Cas.* 1915A, 216.

Attempting to cross in front of observed street-car as contributory negligence, note, *L. R. A.* 1917C, 692.

accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury.

- [6] **ID.—CONNECTION BETWEEN NEGLIGENCE AND INJURY—PROOF BY CIRCUMSTANTIAL EVIDENCE.**—While, by merely proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out, it is not necessary that an eye-witness be produced to testify directly to the fact, but the connection may be made by circumstantial evidence in the same way that any other fact can be so proved.
- [7] **ID.—EXERCISE OF ORDINARY CARE BY PEDESTRIAN—PRESUMPTION.**—In the absence of evidence to the contrary, it will be presumed that a pedestrian who was killed by a street-car while attempting to cross the tracks at a crossing was exercising due and proper care for the protection of his life.
- [8] **ID.—CAUSE OF ACCIDENT—DOCTRINE OF PROBABILITIES—APPLICATION OF RULE.**—The principle of law that if the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible, or by one for which he is not, the plaintiff must fail, is more applicable as a rule to guide the jury in its deliberations upon the facts than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence.
- [9] **ID.—PRACTICE OF STOPPING CARS AT CROSSING—EFFECT OF DEPARTURE FROM.**—The settled practice of stopping a street-car at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted.
- [10] **ID.—EXERCISE OF PROPER CARE BY MOTORMAN—BELIEF OF PEDESTRIAN.**—A pedestrian about to cross a street-car track is entitled to act upon the belief that the operator of an approaching street-car will, upon his part, obey the rules of the company, and run the car at the speed which is customary at that particular place, and that he will give the usual warnings and signals, and take the usual precautions to avoid injury to others.
- [11] **ID.—FAILURE TO FOLLOW SETTLED PRACTICE—DUTY TO ASSUME THAT PEDESTRIAN MIGHT ATTEMPT TO CROSS TRACKS—QUESTION FOR JURY.**—Under the circumstances of this case, in which a boy of the age of sixteen years was killed by a street-car which had failed to stop at a crossing, as had been the settled practice of the company, it should have been left to the jury to say whether or not the manner in which the motorman operated the car at the crossing was such that he should have assumed that persons might ignorantly attempt to cross in front so near the approaching car as to make a collision probable.

- [12] **ID.—DEATH OF MINOR SON — ACTION FOR DAMAGES — HIDING OF SHOE BY MOTORMAN—EVIDENCE OF ADMISSIBLE.**—In this action for damages for the death of a minor son through having been struck and run over by a street-car of the defendant company, the accident having occurred at an early hour of the morning and there having been no eye-witnesses, the trial court committed error in excluding from the jury testimony of the motorman, a codefendant in the action, showing that after the car reached the car-barn a shoe, admitted to be the shoe of the deceased, was found back of the pony truck of the car, that he knew "something had happened," and that he put the shoe in a garbage can used by the city, where it was out of sight.
- [13] **ID.—CONCEALING OF PERTINENT EVIDENCE — TESTIMONY OF ADMISSIBLE—ADMISSIONS.**—Testimony showing, or tending to show, an attempt on the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court or jury, is competent and proper. Such efforts may be shown, not as part of the *res gestae*, but in the nature of an admission, the effect of which is a matter for the consideration of the jury.

APPEAL from a judgment of the Superior Court of Alameda County. Joseph S. Koford, Judge. Reversed.

The facts are stated in the opinion of the court.

Elston, Clark & Nichols for Appellant.

W. H. Smith and A. L. Whittle for Respondents.

**WASTE, P. J.**—This is an action against the defendant street railway company, and its motorman, S. Serpico, for damages resulting from the death of plaintiff's minor son, Andrew Ross.

It is charged in the complaint that at the time he was killed, Andrew Ross, a boy of the age of sixteen years, was walking across Telegraph Avenue, in the city of Berkeley, when a street-car of the defendant company, operated by Serpico at a high, excessive, and careless rate of speed, ran over him, causing his death. It is alleged in a second count that at the time of the accident the motorman so operated the street-car as to lead the boy to believe that it was about to come to a full stop, allowing him to continue safely in his course of walking across the street in front of the car, and

that so believing he attempted to cross the track of defendant, when he was suddenly struck by the car and killed.

The court shut out testimony considered vital by the plaintiff, and at the conclusion of the trial instructed the jury to find for the defendants. From the judgment entered the plaintiff appeals.

There were no eye-witnesses to the accident, which occurred at the intersection of Telegraph and Ashby Avenues, on both of which streets the defendant operated its street railway system. Shortly before 1 o'clock on the morning of February 15, 1918, Andrew Ross, then alive and well, escorted a young lady friend to the place where she was working in Berkeley, a point about five blocks north of Ashby Avenue and three blocks east of Telegraph Avenue. Leaving his companion at the front steps, he walked west on Derby Street toward Telegraph Avenue. At that time Ross lived at 2150 Woolsey Street, which is three blocks south of Ashby Avenue and two blocks west of Telegraph Avenue. It is thus apparent that in order for him to reach his home from the place where he left his friend, it was necessary for him to cross both Telegraph and Ashby Avenues.

At some time prior to 1:20 o'clock, the motorman on a car of the defendant, running south on Telegraph Avenue, discovered the body of Ross lying on the south side of Ashby Avenue, near the west rail of the Telegraph Avenue track. A sergeant of police, who was summoned, found the boy in a dying condition. He was semi-conscious, but could not talk. One of his legs was crushed off, and pieces of the left foot and left shoe were gone. His clothing was badly torn, and he had the appearance of having been rolled and crumpled underneath something. He died soon after being removed to the emergency hospital.

Between the time Ross left his friend, east of the crossing, and the time he was found, car 397 of the defendant company had passed that point. It was a car, which on leaving Berkeley after its final trip, had turned into Telegraph Avenue to run to the car-barn in Oakland for the night. The car never stopped after entering Telegraph Avenue. It slowed down, but did not stop at Dwight Way, on which an intersecting line of the defendant was operated. The motorman gave it "a big kick" after crossing that street; that is, he applied the power for a time, then shut it off, and al-

lowed the car to coast toward Oakland, the grade on Telegraph Avenue being downhill, without applying the brakes at any point to check its speed, which, so he testified, was fifteen or sixteen miles per hour. As he neared Ashby Avenue Serpico had his car under full control, and about one hundred feet north of that street he applied the brakes, and gradually reduced the speed to four or five miles per hour. When the front of his car was about twenty-five feet from the car rails on Ashby Avenue he "gave it some more juice," and went on toward the car-house, without stopping, as he was required by the rules of the company to do, before crossing Ashby Avenue, on which was operated a cross-line of the same company. After the car had passed over the intersecting rails of the cross-line tracks, and had proceeded some ten or fifteen feet, Serpico and the conductor, who was sitting in the forward compartment of the car with him, felt a jar, or jolt, different from that caused by the trucks running over the cross-rails. The car jumped two or three times, the cause of which, the motorman testified, he "thought was a stone on the track . . . he supposed it was a medium sized rock." The car was not stopped, but proceeded to the car-barn. Serpico testified that he heard no outcry at the time, and saw no one crossing, or near the car track, although the streets at that point were well lighted.

When the car turned in at the barn it was discovered that the middle guard on the westerly side was missing and the rear guard was hanging by a single hook. There was blood on the side of the car, on the flange of the front drive-wheel, and hair and blood on the air-compressor, a few feet back of the wheel. The missing side guard was later picked up near the spot where the body of Ross was discovered. A subsequent investigation of the scene of the accident disclosed the fact that his body had been dragged from a point almost on a line with the northerly crossing of Ashby Avenue clear across that street and close beside the westerly rail of the south-bound track. The marks and blood stains on the ground indicated that he had been rolled or dragged some distance before any part of the car ran over his body, which lay at just about the spot where the crew of the car felt the jar, or jolt, as it passed over something.

From the foregoing facts, which appear without contradiction, no one can doubt for an instant that the boy, Ross,

was killed by being run over by the street-car of the defendant railway company, operated by the employee, and codefendant, Serpico. Respondents in their brief apparently concede the point, but argue that the proximate cause of the injury and death rests in surmise and conjecture, and that the evidence fails to establish that it was proximately caused by the negligence of the defendants. That was the view adopted by the lower court, as indicated by its action in removing the cause from the consideration of the jury. The appellant contends that it was error for the court to direct a verdict in the case, claiming that upon the evidence the presumption was that the boy was killed through the negligence of the defendant; that although that presumption might be rebutted it was a question for the jury whether the facts and circumstances in the case did so. The respondents answer that there was no evidence tending in any way to show that the plaintiff's son was killed by any act of it; and particularly contends that, if it be admitted that the boy was killed by the street-car, there is nothing tending in the slightest to show any negligence on its part. The ruling of the lower court presents the main issue for determination upon this appeal.

[1] In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture, or surmise, that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. When the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury. (*Janin v. London etc. Bank*, 92 Cal. 14, 27, [27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100].) A directed verdict is proper, unless there is substantial evidence tending to prove in favor of a plaintiff all the controverted facts necessary to establish his case. [2] In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. (*Estate of Baldwin*, 162 Cal. 471, 473, [123 Pac. 267].) [3] The



doctrine of *res ipsa loquitur* has no just or proper application to the case of a collision between a street-car and a pedestrian on the street. Such mishap is quite as likely to be due to the fault of the person struck, or of some third person, or to some unforeseen and unpreventable cause, as to the negligence of those operating the car. (*Tower v. Humboldt Transit Co.*, 176 Cal. 602, 607, [169 Pac. 227].) Consequently it was not sufficient for the plaintiff in the instant case to merely show the happening of the accident. It was necessary that he go further, and fasten the blame for the injury upon the defendants.

[4] At the time of the happening of the accident in question the duty of the defendants and of the decedent were reciprocal. Each was required to approach the crossing with a due regard for the rights of the other, and if either failed to observe the care required, it was negligence for which the guilty party is responsible. (*Bickel v. Pennsylvania R. R. Co.*, 217 Pa. St. 456, 462, [118 Am. St. Rep. 926, 66 Atl. 756].) In *Kansas City etc. R. R. Co. v. Gallagher*, 68 Kan. 424, [64 L. R. A. 344, 75 Pac. 469], the court held that while it is the duty of a pedestrian upon a city street, who is about to cross the track of an electric street railway company, to exercise his faculties, and take ordinary care to avoid collisions with the cars: If he does look and listen, he will be held to an apprehension of that which he should have seen and heard, and if he fails to look and listen, he will be held to the same liability in case of disaster as if he had done so. [5] But a traveler may cross an electric street railway track in front of an approaching car which he sees and hears and not be negligent. If, in view of his distance from the car, the rate of its speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury. (See, also, *Baltimore etc. R. R. Co. v. Griffith*, 159 U. S. 603, 611, [40 L. Ed. 274, 16 Sup. Ct. Rep. 105, see, also, Rose's U. S. Notes].)

In support of the action of the lower court in the instant case in directing the jury to return a verdict in favor of the defendants, the respondents rely upon *Puckhaber v. Southern Pac. Co.*, 132 Cal. 363, [64 Pac. 480], as deciding this case. As was said by the writer of that decision, the facts

of the case were of the most meager character. Upon a dark and foggy morning, about half-past 5 o'clock, the mutilated dead body of a young man, a total stranger in the locality, was found lying upon a side-track in the railroad yards of the defendant, near the dead body of another man, also a stranger in the village. There was no witness to any accident. It was claimed by the plaintiff that the deceased was killed by a backing engine and tender which passed over the particular spot to the roundhouse about an hour earlier on the same morning. The negligence of the defendant was claimed to be established by showing that the tender of the engine had no light upon the rear end. The court held that, conceding these facts, the case was still too weak to support a verdict, for the reason that there was a total lack of evidence showing any causal connection between the absence of a light upon the tender and the death of the deceased. This was held to be true, even though it be assumed to be the law of this state that, in the absence of evidence upon the subject, it will not be presumed that the deceased was himself guilty of negligence. The court said, "It is as necessary for the plaintiffs to show that the defendant's negligence caused the injury, as it is for them to show that the defendant was guilty of negligence, or that the party was injured." (*Puckhaber v. Southern Pac. Co.*, 132 Cal. 365, [64 Pac. 481].) [6] By proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. (*Union etc. Co. v. San Francisco Gas etc. Co.*, 168 Cal. 58, 62, [141 Pac. 807].) These rules, however, do not require demonstration of the connection between the proved, or admitted, negligence and the resulting injury. It is not necessary that an eye-witness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be so proved. (*County of Alameda v. Tieslau*, 44 Cal. App. 332, [186 Pac. 398].) The conclusion reached by the court in the Puckhaber decision was, no doubt, correct upon the facts there considered. The circumstances disclosed in other cases, possibly possessing some degree of similarity, may not fit the facts of that case. (*Peters v. McKay*, 136 Cal. 73, 76, [68 Pac. 478].)

[7] While, as before stated, the presumption arising from the doctrine of *res ipsa loquitur* does not apply to accidents

like the one in which young Ross was killed, another, and an equally binding, presumption does arise, to wit, that the deceased, in such cases, exercised ordinary care. The rule of law referred to in the Puckhaber decision is, perhaps more clearly stated in a later case, in which the court said: "Where death is occasioned under circumstances such as this, without eye-witnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure—namely, that a person takes ordinary care of his own concerns. (Code Civ. Proc., sec. 1963, subd. 4.) . . . This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide. (Code Civ. Proc., sec. 1961.)" (*Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500, 506, [143 Pac. 714].) In applying this principle of law to personal injury cases the supreme court of the United States has said: "The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience that have surer foundation. . . ." (*Baltimore etc. R. R. v. Landrigan*, 191 U. S. 461, 474, [48 L. Ed. 262, 24 Sup. Ct. Rep. 137, see, also, Rose's U. S. Notes].) When recourse must be had to this rule of human conduct, in determining the question of responsibility in cases of accidents like the one now being considered, "it is fair to presume, until the contrary is proven, and this presumption is sustained by a rule of law, that one who was killed while crossing a railroad track was exercising due and proper care for the protection of his person and the preservation of his life. The presumption which arises in favor of the instincts of self-preservation, and the known disposition of men to avoid injury and personal harm to themselves is sufficient to constitute *prima facie* evidence that the person killed was at the time of the accident free from contributory negligence." (*Fleenor v. Oregon Short Line R. R. Co.*, 16 Idaho, 781, 802, [102 Pac. 897, 903].)

Existing facts and circumstances very similar to those surrounding the death of the boy Ross, in this case, have been frequently considered by the courts, in the light of the fore-

going rule of self-preservation. In *Robbins v. Pennsylvania Co.*, 257 Fed. 671, [168 C. C. A. 621], the decedent left the house of a friend, which was on the east side of the street and south of the two railroad tracks, for the purpose of mailing a letter at the postoffice, which was on the west side of the street and on the north side of the tracks. At the time she started on this errand the south track was occupied by a long, slowly moving east-bound freight train. At about the time the caboose at the rear of this train passed out of the street, an engine drawing a short west-bound train on the northerly track, and running at a speed of fifty-five to sixty miles an hour, suddenly burst into view, without ringing of bell or blowing of whistle. The proof tended to show that it was this west-bound train on the northerly track which struck and killed the decedent. No one saw the decedent after she left her friend's house, and the point of collision was left to inference. The trial court directed a verdict in favor of the defendant, one of the grounds being that the plaintiff had not sustained the burden of showing that the defendant's alleged negligence was the direct and proximate cause of decedent's death. The trial judge concluded that the "decedent must either have crossed behind the east-bound train immediately on its clearing the sidewalk, when she was not in position to see the west-bound train, or have gone ahead without looking to see whether a train was coming from the east. This conclusion is not," said the circuit court of appeals, in reversing the lower court, "in our opinion, inevitable, at least on the theory that the collision occurred at the west crossing. Defendant had the burden of proving decedent's negligence. The law presumes that following the instinct of self-preservation she exercised due caution, and that before crossing the tracks she looked and listened for approaching trains." After citing a number of cases, some of which we have already alluded to, the court considered the circumstances and held that as different inferences might be drawn from the circumstances surrounding the accident, the decision of the question rested with the jury.

A case having some of the essential features of the case at bar was considered by the United States supreme court in *Baltimore etc. R. R. v. Landrigan*, 191 U. S. 461, [48 L. Ed. 262, 24 Sup. Ct. Rep. 137]. The deceased was em-

ployed on the night force of the railroad company. The usual and direct route to his home took him over a well-lighted crossing. A few minutes after he left the round-house his body was found near the crossing with flesh and blood scattered along the track. There were no witnesses to the accident. At that time a switching crew was making up a train, one of the Pullman cars of which broke loose by reason of an alleged defective method of coupling, and was shunted over the crossing. A passenger train passed the same point just about the same time. On these facts the trial court refused to direct the jury to render a verdict for the defendant, but submitted the case to the jury, which found for the plaintiff. On appeal it was held that it was not error for the lower court to instruct the jury that in the absence of all evidence to the contrary there was a presumption that the deceased stopped, looked, and listened before attempting to cross the tracks, citing *Texas etc. Ry. Co. v. Gentry*, 163 U. S. 353, 366, [41 L. Ed. 186, 16 Sup. Ct. Rep. 1104, see, also, Rose's U. S. Notes]. The railroad company also contended that as there was no evidence from which it could be determined that it was the uncoupled Pullman car, and not the passing express train, which injured the deceased, it was error to submit the issue to the jury. The supreme court held that the action of the lower court was right, saying, "There was certainly evidence on the issue from which reasonable men might draw different conclusions."

In *Dalton v. Chicago etc. Ry. Co.*, 104 Iowa, 26, [73 N. W. 349], a highway crossing accident occurred at night. The decedent was struck by a passing train of the defendant. There were no witnesses to the conduct of the deceased. The contrary not appearing, it was held that it must be presumed that the decedent exercised care on approaching and going upon the crossing, and that whether the circumstances were such as to overcome that presumption was a question for the jury. Other cases to the same effect are *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593, [89 S. W. 602, 608]; *Lewis v. Rio Grande Western Ry. Co.*, 40 Utah, 483, [123 Pac. 98, 99]; *Lotz v. Baltimore & O. Ry. Co.*, 247 Pa. 206, [93 Atl. 274]; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, [53 L. Ed. 453, 29 Sup. Ct. Rep. 270, see, also, Rose's U. S. Notes]; *Korab v. Chicago etc. Ry. Co.*, 149 Iowa, 711, [41

L. R. A. (N. S.) 32, 38, 128 N. W. 529]. In the last case cited in which no witnesses appeared to testify to the accident, the court set aside a directed verdict in favor of the defendant, and held the decedent's administrator entitled to the benefit of the presumption of due care on the part of the deceased, saying: "If the record is such that, under the rule to which we have referred, a presumption of due care obtains, then proof of an act which may, or may not have been negligent, according to the circumstances under which it was done, will not justify a holding as a matter of law that the presumption of due care is thereby rebutted."

[8] The respondent contends that we should view the evidence as presenting only a question of probabilities, and cites *Tremelling v. Southern Pac. Co.*, 51 Utah. 189, [170 Pac. 80, 83], to the effect that "if the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible, or by one for which he is not, the plaintiff must fail." This principle of law is more applicable as a rule to guide the jury in its deliberations upon the facts than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence. (*Peters v. McKay*, 136 Cal. 73, 76, [68 Pac. 478].) The foregoing cases bearing on the point and others which have been examined by us present facts with many essentials similar to the circumstances surrounding the accident in which Ross was killed. In few, if any, were the facts as strong. Yet the action of the trial courts in refusing to direct verdicts for the defendants was upheld on the one hand, and the granting of such relief was reversed on the other.

In the instant case, the decedent was a traveler. The plaintiff sought to introduce evidence to establish that the decedent Ross, on leaving his friend at her doorstep, a few minutes before he was killed, stated to her that he was going to his home, the purpose being to show that his intended route would take him across the tracks of the defendant, and that he was a traveler crossing the street when killed, and not a trespasser suddenly approaching the car from the west, and attempting to steal a ride, as was suggested by the defense, at the trial. This testimony was excluded by the court. Whether or not the action of the trial court, in refusing to admit the declaration as to the boy's intention,

was error, we are of the opinion that in the absence of testimony the jury had the right to assume that he was going to his home and was therefore a traveler, rightfully upon the streets. The hour of the night, the circumstances that he had just escorted his friend to her home, coupled with the further facts that he was a sober, industrious, working boy, and that his home was situated in a southerly and westerly direction, across the intersecting tracks of the company at Ashby and Telegraph Avenues, in almost a direct line from the point where he left his companion—all these circumstances readily give rise to such an inference. The intersection of the streets mentioned, according to the testimony, was well lighted, and the car was equipped with a headlight. The details of the accident, it is true, were few, but they were related by a defendant, who was also an employee of the railway company. He was an interested witness, and although he testified that he did not see the boy before the accident or at any time, yet, there being no obstruction to the view, the jury would have the right to closely scrutinize his testimony, in view of all the circumstances, to see if he was on the lookout for approaching pedestrians, as his testimony would seem to imply. (*Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 665, [62 Pac. 308, 64 Pac. 993].) The motorman was also guilty of a violation of the rules of the company requiring him to bring his car to a full stop before crossing Dwight Way and the Ashby Avenue tracks. After passing the former street, he had "given his car a big kick," and it was coasting on the downgrade toward the car-house, on its last trip late at night, at a rate of speed which, if the testimony of the motorman be true, would not be considered excessive. By his own testimony, Serpico would make it appear that when about one hundred feet north of the Ashby Avenue tracks, he retarded the speed of his car from fifteen or sixteen miles an hour to four or five miles an hour, at which speed he was going when he was about twenty-five feet north of the crossing. He then "gave it more juice." It is very easy to infer from the circumstances that young Ross was acquainted with the rule requiring the cars to stop before crossing intersecting tracks. He had been living in the vicinity some little time, and it is almost, if not quite, a matter of common knowledge that the street-cars do slow their speed materially, or come to

a full stop, at such points. [9] The settled practice of stopping a street-car at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted. (*Godfrey v. Old Colony St. Ry. Co.*, 223 Mass. 419, [111 N. E. 878]; *Kostuch v. St. Paul City Ry. Co.*, 78 Minn. 459, [81 N. W. 215]; *McDivitt v. Des Moines City Ry. Co.*, 141 Iowa, 689, [118 N. W. 459, 462].) It may be inferred from circumstantial evidence that a deceased person had knowledge of a rule governing the operation of cars, and that he put some reliance upon it. (*Boston & M. R. R. v. Rafalko*, 228 Fed. 440, [143 C. C. A. 22].) In addition to the presumption, in the instant case, the motorman by the operation of his car gave every indication that it was his intention to comply with the rule. He slowed his car from a rate of speed at which he was coasting toward the car-barn, as he approached the crossing. His failure to finally stop, as his handling of the car indicated he would, tended to show negligence on his part. (*Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 503, [115 Pac. 320].) [10] Ross was entitled to act upon the belief that the operator of the street-car would, upon his part, obey the rules of the company, and run the car at the speed which was customary at the particular place, and that he would give the usual warnings and signals, and take the usual precautions to avoid injury to others. He was not, in law, bound to believe that the car, provided he saw it some distance away, would not check its speed as it drew near the intersecting crossing. (*Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 604, 610, [93 Pac. 677].) [11] Under the circumstances of this case, we do not feel that it can be said, as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would be required of him in such case, to anticipate such probability, and the results reasonably arising from the consequences of his own action. It should have been left to



the jury to say whether or not the manner in which he operated the car at the Ashby crossing was such that he should have assumed that persons might ignorantly attempt to cross in front so near the approaching car as to make a collision probable. (*Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 138, [5 L. R. A. (N. S.) 1059, 85 Pac. 152]; *Runnels v. United Railroads*, 175 Cal. 528, 533, [166 Pac. 18]; *Drouillard v. Southern Pac. Co.*, 36 Cal. App. 447, 451, [172 Pac. 405]; *Haughey v. Pittsburg Ry. Co.*, 210 Pa. St. 363, 366, [59 Atl. 1110]; *Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, [9 L. R. A. 521, 46 N. W. 543]; *Tegels v. Great Northern Ry. Co.*, 120 Minn. 31, [138 N. W. 945].)

[12] The plaintiff's son being dead, and there being no eye-witnesses to the accident, the plaintiff was compelled to rely upon the motorman, Serpico, who was also a defendant in the action, to establish the circumstances surrounding the accident. He did not appear at the trial in person, but his deposition was read in evidence. Therein he testified that when his car reached the car-barn immediately after the accident a shoe, admitted to be one the deceased was wearing, was found back of the pony truck of the car. Serpico testified that at that time, "I was so nervous and mixed up—I know something had happened. I don't know if I picked up the shoe or the conductor give it to me. . . . I put it in a garbage can what the city uses . . . it has a tin lid that lifts up and down. . . . After it was in there of course it was out of sight." When this testimony was offered the court sustained the objection of the defendants that it "bore no relation whatever to the case," and excluded the testimony from the jury. Only this general objection was made. We think this was error. Serpico was a defendant, and the employee of his codefendant. A strong inference arising from his action, and certainly a most plausible explanation of his conduct, is that he was attempting to conceal evidence, which in his mind had an important bearing upon the "something" that had happened. His conduct was indicative of a belief, and in the nature of an admission, that his cause could best be served by suppressing the evidence of the injury. [13] Testimony showing, or tending to show, an attempt on the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court or jury is competent and proper.

Such efforts may be shown, not as part of the *res gestae*, but in the nature of an admission, the effect of which is a matter for the consideration of the jury. (*Silva v. Northern Cal. Power Co.*, 32 Cal. App. 139, 146, [162 Pac. 412]; *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 437, [112 Pac. 564].)

The judgment is reversed.

Richards, J., and Gosbey, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 26, 1920.

All the Justices concurred, except Olney, J., who voted for granting of petition.

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[Civ. No. 2958. Second Appellate District, Division One.—May 27, 1920.]

S. T. MILLER, Respondent, v. HUNT, HATCH & COMPANY, Appellant.

[1] **CONTRACTS—SALE OF CROP OF ORANGES—DESTRUCTION BY FROST—LIABILITY OF BUYER.**—Where a contract for the sale of a crop of oranges then growing in a certain orchard states that the owner “has this day sold” the same, and provides that the buyer is to furnish all boxes to put the said fruit in and to pick the fruit free of all costs to the owner, the fruit to be of merchantable quality and picked at the option of the buyer, provided the same is removed on or before a specified date, the buyer is obligated to take the fruit which is mature and ready for the market on or before that date, and at such reasonable time as should be necessary to insure their good condition, and where the buyer does not do so, and the fruit is destroyed by frost, the buyer is liable to the owner for the purchase price thereof.

[2] **ID.—ACTION TO RECOVER UNPAID BALANCE—CONDITION OF FRUIT—EVIDENCE—FINDINGS—APPEAL.**—In this action to recover an unpaid balance alleged to be due on the sale by plaintiff to defendant of a crop of oranges, a part of which had been destroyed by frost, the evidence was sufficient to support the findings of the trial court that the portion of the fruit which was marketable on

a specified date was easily and readily separable from that which had been frozen, and that the fruit for which compensation was allowed was merchantable during a certain specified period; and, though there was testimony to the contrary, such findings were conclusive on the appellate court.

**APPEAL** from a judgment of the Superior Court of Tulare County. J. A. Allen, Judge. Affirmed.

The facts are stated in the opinion of the court.

Farnsworth, McClure & Burke for Appellant.

Charles W. Braswell and Middlecoff, Scott & Ham for Respondent.

**CONREY, P. J.**—Action to recover an unpaid balance alleged to be due on the sale by plaintiff to the defendant of a crop of oranges. Judgment in favor of the plaintiff, from which the defendant appeals.

[1] In a written agreement, of date April 20, 1916, it was stated that the plaintiff "has this day sold" to the defendant his entire crop of oranges, now on the trees growing on his ranch at Lindsay, California, at a stated price per hundredweight. "All fruit is to be weighed at the Hunt, Hatch & Company's packing house and paid for upon the delivery of duplicate weight receipts at their office at the said packing house at Lindsay. Hunt, Hatch & Company are to furnish all boxes to put the said fruit in and agree to pick and haul the said fruit free of all costs to the said S. T. Miller. Fruit is to be of merchantable quality and picked at the option of the said Hunt, Hatch & Company, provided same is removed on or before December 25, 1916." The court found that on the thirteenth day of December, 1916, there remained in plaintiff's orchard 380 trees which were unpicked; the amount of unpicked oranges thereon being 85,000 pounds. Finding V reads as follows: "That on November 16, 1916, some of said oranges were injured by frost but at least 80 per cent of said oranges were from November 16, 1916, to December 13, 1916, uninjured and were ripe, in good condition, ready for harvest, and merchantable; that between said November 16, 1916, and December 13, 1916, defendant had sufficient time to pick and

haul said ripe and merchantable oranges and could and should have done so; but defendant failed and neglected to pick or haul or pay plaintiff for said merchantable portion of said fruit within said time or at all; that said merchantable oranges were readily and easily separable from the injured oranges; that on the night of December 13, 1916, said merchantable oranges were injured by frost and later about January 6, 1917, were totally destroyed by frost and the amount of merchantable fruit which the defendant so left on said trees unpicked and unharvested in a ripened and merchantable condition and quality which defendant should and could have picked in such merchantable condition was 68,400 pounds." Finding VII is as follows: "That from Nov. 16 to the 13th day of December, 1916, all of said 68,400 pounds of fruit above mentioned came up to the test of an ordinance of the Board of Supervisors of the County of Tulare, mentioned in the Answer of defendant, and none of said 68,400 pounds had been frozen prior to December 13, 1916, to such an extent as to render the same wholly unfit or unfit at all for consumption or merchantable."

Appellant contends that there was only an agreement for sale and not an actual sale of the crop; and that under the contract the purchaser had the right, at his own option, to defer the time of picking the fruit until the twenty-fifth day of December, 1916, provided only that it was all picked not later than that date. The effect of this contention, if allowed as appellant insists upon it, would be that, even if the fruit was mature and ready for the market on and after November 16th, the loss caused by its destruction by frost at any time prior to December 25th would have to be suffered by the plaintiff. With this contention and its claimed effect we do not agree. In *Bill v. Fuller*, 146 Cal. 50, [79 Pac. 592], the contract was for the sale of a crop of oranges not yet matured, and it was provided therein that the vendee "has this day bought" a described crop of oranges. It was provided that all of the oranges were to be taken by the purchaser on or before a stated date, and the vendor was to deliver at a certain station when wanted by the purchaser. Of this contract the supreme court said: "Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The

agreement in form imports a present sale, the thing sold was in existence and was identified and separate from other things." The contract in that case limited the time of delivery in a similar manner as in the case at bar; the language used being, "all oranges to be taken by H. Fuller on or before April 1, 1901." The court found that the oranges became ripe and ready for market in January, 1901, but the defendant refused to receive them until March, at which time, without fault of the vendor, some of the fruit had become unmerchantable by becoming too ripe and puffy for the market. Under these circumstances it was held by the supreme court that the contract should not be construed to give Fuller the absolute right to defer the delivery of the oranges to the injury of the plaintiff; that it must be construed to mean that the oranges were to be taken by Fuller on or before April 1, 1901, and at such reasonable time as should be necessary to insure their good condition with respect to maturity and fitness for the market. "The merchantability which was warranted by the contract, if there was any such warranty, was nothing more than a warranty that the fruit should be merchantable on the tree, and that when gathered in due season it should be handled and delivered with proper care. This being the case, under the findings we think the defendant was not justified in refusing to accept the oranges which he culled from the crop because of his claim that they were too ripe and puffy for the market." So here, assuming the facts to be as found by the court, the appellant was obligated to take the oranges on or before the twenty-fifth day of December, 1916, and at such reasonable time as should be necessary to insure their good condition.

[2] Appellant contends that the evidence is not sufficient to support the finding that the portion of the fruit which was marketable on November 16th was easily and readily separable from that which had been frozen; and that the evidence is not sufficient to support the finding that the fruit for which compensation has been allowed was merchantable from November 16th to December 13, 1916. From the testimony of defendant's manager, Mr. Sparks, it appears that in November or December, 1916, the defendant procured for use in its packing-house a machine called a separator, which was used for the purpose of separating

frozen fruit from the better fruit. This machine was first put in operation by the defendant on the thirteenth day of December. It does not clearly appear from his testimony that the oranges which were run through the separator at that time were from the Miller orchard, nor was the time stated at which such fruit had been picked. He states that the result of the operation was that the fruit was so badly frozen that it was hard to separate the best from the worst of it; it was so badly frozen that they could not separate the fruit properly. Mr. Sparks states that the first frost occurred on November 16th, and the second, which was the disastrous frost, occurred on December 13th. There is no evidence that fruit picked from the Miller orchard prior to December 13th could not have been successfully graded by means of this separator so as to pick out the frosted fruit from that which was not frosted. Frank Brann, horticultural commissioner, a county officer, who, in co-operation with an officer of the United States government, appears to have made examinations of the fruit in this packing-house and exercised some authority over shipments, testified that all of the fruit from the Miller orchard that came into the defendant's packing-house (although some of it was held up temporarily) was passed and certified as marketable before the first day of January. There was introduced in evidence an ordinance of the county of Tulare which prescribes a test of maturity of oranges, which is commonly known as the 8-to-1 test and refers to the quantity of soluble solids in the orange as compared with the quantity of acid contained in the juice. The plaintiff testified that, on December 10th or 12th, he took from the orchard samples for testing, and had them tested by S. Kohner, a tester employed in the packing-house of the Randolph-Martin Fruit Company. Mr. Kohner testified that the tests which he made of these samples were, on December 14th, 8.2-to-1, and on December 21st, 7.5-to-1. Mr. Sparks testified that the defendant caused some tests to be made by one E. G. Rooke about November 20th. The actual results of those tests were not given in evidence. Sparks says that they were "not satisfactory." Referring again to the same matter, he said: "There was a difference in the fruit; some of the fruit on the outer side of the orchard gave a different test from trees inside the orchard." In another place Mr. Sparks testified that none of it tested

8-to-1. It is to be observed here that there was a sharp contradiction between the testimony of plaintiff and the testimony of Sparks concerning certain conversations between them. It may be that the court, as was its right, placed the greater confidence in the testimony of the plaintiff as to those conversations, and for that reason discounted the testimony of Sparks on the subject of the 8-to-1 test and the other conditions of the fruit. The plaintiff testified that the fruit was, on the 20th of November, of fair size and color, and in good condition; that beginning on November 20th the defendant picked the fruit from the northern part of the grove, and all of that fruit was paid for; that the fruit was merchantable from November 20th to January 6th; that Mr. Sparks did not tell him at any time prior to December 25th that the fruit was frozen; that after December 25th, at a time when defendant had stopped picking from this orchard, plaintiff asked Mr. Sparks when he expected to finish packing the fruit, and Sparks replied that he would pick it as fast as he could get to it—as fast as he could handle it he would take it; that the plaintiff used fruit daily from this orchard at his house from the time they commenced picking on November 20th until after January 1st, and it was in good condition. Answering the question, "Was it frozen?" he replied: "Not that I could tell." Plaintiff further testified that the fruit on the south portion of the orchard which was not picked was as good as that on the northern portion which was picked by the defendant; that it was practically the same.

From the foregoing summary of a part of the evidence our conclusion is that the evidence is sufficient to support the findings of fact to which we have referred and which are challenged by appellant. There is on several of these points evidence to the contrary of that which has been stated, but this is no more than sufficient to produce a conflict in the evidence. On such state of the record, under the well-established rule, the findings must be sustained.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

[Civ. No. 3201. Second Appellate District, Division Two.—May 27, 1920.]

**F. W. HUNT, Appellant, v. A. GLASSELL, Respondent.**

- [1] **NEGOTIABLE INSTRUMENTS—ASSIGNMENT BEFORE MATURITY AS COLLATERAL SECURITY—CONSIDERATION—DEFENSES.**—An assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser thereof under the law-merchant against defenses to the note of which he has no notice at the time of the indorsement.
- [2] **ID.—INDORSEMENT AFTER MATURITY—DEFENSES AVAILABLE.**—The maker of a note sued on by an indorsee after maturity may prove anything in defense which goes to destroy or satisfy the note,—anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes an admission or affirmance of the plaintiff's right of action and his title to the money he seeks to recover, but which seeks to defeat the recovery by establishing liability on his part. Within this class of defenses are fraud, mistake, want or failure of consideration, release, or anything else which goes to show that he ought never be compelled to pay the note to the person to whom it was originally given, or to any person who had held it after maturity, and before it came into the hands of the plaintiff.
- [3] **ID.—SALE BY BANKRUPTCY COURT—WANT OF POSSESSION—DEFENSES OF MAKER.**—A bankruptcy court possesses no such power that it can, by a pretended sale of a purported right to a promissory note which it had never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before the payee named therein had been adjudged a bankrupt, deprive the maker thereof of such defenses thereto as he might interpose at the time it was so delivered as such collateral security.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Chas. Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Murphey & Poplin for Appellant.

J. E. Hannon and J. Vincent Hannon for Respondent.

**THOMAS, J.**—This is an action brought to recover judgment against the defendant on a promissory note alleged to



have been made, executed, and delivered by the defendant on the twenty-fifth day of September, 1907, to the Duquesne Brewing Company, a corporation, for the sum of ten thousand dollars, subsequently delivered as collateral security to the Fidelity Investment Company, and by further transfers, hereinafter set forth, eventually becoming the purported property of this plaintiff.

In this, as in all cases, our first query is not, "Is there error in the record?" but, rather, "Is there prejudicial error?" or "Is the judgment just?" In quest for the correct answer to the latter inquiry, it will be necessary, we think, to set forth briefly a statement of the case, as disclosed by the record.

It first appears that on September 25, 1907, this defendant, as the result of certain representations made to him by an agent of the Duquesne Brewing Company, a corporation—the payee named in the note hereinafter referred to—executed and delivered to said brewing company a certain subscription for two hundred shares of stock in said corporation, which subscription reads as follows, to wit: "I, the undersigned, hereby subscribe for 200 shares of the capital stock of the Duquesne Brewing Company, par value \$50.00, amounting to ten thousand dollars, payable as follows, to wit: August 1st, 1908. Witness my hand and seal this 25th day of September, 1907. Andrew Glassell (Seal)"; and at the same time and place, as a part of the same transaction, and as further evidence of the promise and agreement to pay for such shares, but not as payment therefor, the defendant also executed the note sued on here, which note is in words and figures as follows: "\$10,000.00. September 25, 1907. Ten months after date I promise to pay to the order of Duquesne Brewing Company ten thousand dollars. This note is negotiable and payable without any relief or benefit whatever, from stay, valuations, appraisements or homestead exemption laws. Due August 1, 1908. Andrew Glassell."

Briefly stated, the representations so made to induce defendant to execute the subscription and the note were as follows: That said brewing company was about to erect, in the city of Los Angeles, a brewery of large capacity, and engage in the business of conducting such brewery in said city; that it owned the land upon which such brewery was to be erected, and that it had money enough on hand to erect

and to put the brewery in operation; that the buildings would be completed and the brewery in operation by August 1, 1908; and that if defendant did subscribe for such two hundred shares he would not be required or called upon to pay said subscription, or to accept such stock, prior to the completion of said brewery and the commencement of the operation thereof. That each and every one of said statements was false, and known by said brewery company to be false, for the reason that such company did not own the land referred to, or have sufficient funds on hand with which to complete the brewery or to put the same in operation.

We are next met with the fact that the shares of stock so subscribed for were never issued or delivered to defendant, or to anyone else for him; that before the expiration of the time within which the money was, by the terms of the subscription and note, to be paid and said stock delivered, the said brewing company had wholly abandoned the intention to erect such brewery or to engage in the business of manufacturing or selling the products thereof, and had wholly abandoned the purposes for which said subscription to its capital stock was made; and that it had been, at all times mentioned, unable to erect such brewery or to carry out the purposes or intention for which said subscription was obtained, or to engage in the business as already set forth.

In addition to said alleged fraud, one of the defenses made by defendant here was that there was no consideration for the subscription referred to, or for the note which is the basis of this action.

Some time between "some time in the year 1909" and prior to the twenty-fourth day of June, 1909, the said Duquesne Brewing Company, being indebted to the Fidelity Investment Company in the sum of about two thousand five hundred dollars, as evidenced by a promissory note payable to and negotiated by one Martel to the latter company, delivered the note sued on here to said investment company as collateral security to secure the payment of such indebtedness. Thereafter, and on the twenty-fourth day of June, 1909, such indebtedness being past due and unpaid, the said Fidelity Investment Company brought suit on the ten thousand dollar collateral security note; and while such suit was pending, and prior to the tenth day of May, 1910, the plaintiff in that action sold and transferred the said two thousand five hun-

dred dollar note—the transaction carrying with it the note here involved and so held as collateral security—to one Hugh Glassell, the latter conducting and continuing the suit so commenced in the name of his assignor, the Fidelity Investment Company. On or about May, 10, 1910, this defendant, believing that said Hugh Glassell was an innocent holder of said note for value, paid to him something more than two thousand five hundred dollars, in full payment and discharge of the said ten thousand dollar note for cancellation, and it was thereupon destroyed. On October 5, 1909, the Duquesne Brewing Company was, in accordance with the federal bankruptcy law, adjudged a bankrupt, a trustee of the estate of the bankrupt was duly appointed, and, by the referee to whom the matter was referred, authorized to sell at public auction the assets of such bankrupt. Thereupon the trustee proceeded as directed to sell the property of the bankrupt estate, which consisted of certain real estate and promissory notes, among which was included the note of defendant upon which this action is based—being designated as “Parcel 3. Andrew Glassell, promissory note for \$10,000.” On December 19, 1910, seven months and nine days after the payment of said sum by this defendant to said Hugh Glassell, and at least one year, five months, and twenty-five days after the note in controversy was delivered by the Duquesne Brewing Company as collateral security to said Fidelity Investment Company, the note having been so delivered at least three months and eleven days before the adjudication of said brewing company to be a bankrupt, as already set forth, the trustee in bankruptcy was authorized to sell all of said property, which, as we have already shown, purported to include the note in question, notwithstanding the fact—which must now be obvious—that this note was not among the assets of said bankrupt estate at the time the corporation was by the court declared a bankrupt, nor has it been at any time since—it being shown that the company had not possessed it at all since June 24, 1909. Pursuant to said purported order, the trustee in bankruptcy made a purported sale of said note to the plaintiff herein, which purported sale the referee in bankruptcy did thereafter, on January 23, 1911, pretend and purport to confirm. Accordingly, on January 26, 1911, whatever right the said Duquesne Brewing Company, a corporation, bankrupt, had in and to said note was

pretended and purported to be sold and delivered to the plaintiff herein.

Under these facts and conditions plaintiff claims that the judgment so entered should be reversed, and the lower court directed to enter judgment in his favor "as prayed for in his second amended complaint."

The trial court found, among other things, as follows: "It is not true that at the time the defendant made said payment he knew that said note for ten thousand dollars made by him to Duquesne Brewing Company was held by the Fidelity Investment Company as collateral security to secure the payment of the said two thousand five hundred dollar note or notes, or for no other purpose, or knew that the only interest that the Fidelity Investment Company had in said note of ten thousand dollars was to the extent of two thousand five hundred dollars, with interest; nor is it true that said note was at the time of said settlement held by the said Fidelity Investment Company, a corporation, as collateral security or otherwise. . . . The court further finds that the note herein sued on . . . is the same note that was sued on in the original complaint; . . . that said note had been delivered up to be canceled as fully paid and discharged, and had been canceled and destroyed, paid and discharged prior to . . . December 10, 1910." There is evidence to support these findings.

Were this action between the defendant here and the brewing company, there is no question but that on the showing made the defendant would have been entitled to judgment on both grounds, i. e., "fraud" and "no consideration." Is the plaintiff in this action in any better position than the brewing company would have been? We think not.

As we have already seen, the ten thousand dollar note was due by its terms on August 1, 1908. The Fidelity Investment Company became the holder of the note during the year 1909, and prior to June 24th of that year, which was some time after the note had become due. It was, therefore, as a matter of law, received by said investment company, as well as by the latter's successor in interest—Hugh Glassell—subject to any and all defenses which the maker thereof, defendant here, might interpose. (*Risley v. Gray*, 98 Cal. 40, [32 Pac. 884]; *James v. Yaeger*, 86 Cal. 184, [24 Pac. 1005]; *Brady v. Henry*, 71 Cal. 481, [60 Am. Rep. 543, 11 Pac. 385,

12 Pac. 623]; *Folsom v. Bartlett*, 2 Cal. 163.) [1] The rule in this state is that an assignment of a negotiable instrument *before maturity* as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser thereof under the law-merchant against defenses to the note of which he has no notice at the time of the indorsement. (Secs. 3123 and 3124, Civ. Code; *Pezzoni v. Greenwell*, 178 Cal. 649, [174 Pac. 60].) The record in the case at bar discloses the fact that the note in question was signed by defendant, made payable "to the order of Duquesne Brewing Company," and was negotiable in form. The court found that said brewery company did practice the fraud upon defendant and induced him to subscribe for said stock, and that no stock was ever issued or delivered by said brewery company to defendant—which findings find support in the evidence. The court further found that at the time said Fidelity Investment Company so received the said note it had no notice of any fraud in the procuring of the note in the first instance, or of any defense to its validity, except the fact that it was by its terms several months past due. It also appears that no call or assessment upon the stockholders or against the stock subscribed for was made by the board of directors of said brewing company at any time, for any amount, nor by said bankruptcy court or the trustee therein; nor were any proceedings had to determine what, if any, amount would be necessary to pay the debts, etc., of the bankrupt corporation; and that there are no unsatisfied creditors.

[2] Under such conditions as these, the general rule is that "the maker of a note sued on by an indorsee after maturity may prove anything in defense which goes to destroy or satisfy the note,—anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes an admission or affirmation of the plaintiff's right of action and his title to the money he seeks to recover, but which seeks to defeat the recovery by establishing liability on his part. Within this class of defenses are fraud, mistake, want or failure of consideration, release, or anything else which goes to show that he ought never be compelled to pay the note to the person to whom it was originally given, or to any person who had held it after maturity, and before it came into the hands of the plain-

tiff." (Note to *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank* (Ill.), 46 L. R. A. 760.) There is, therefore, no merit in appellant's contention that respondent here is liable as trustee of an involuntary trust.

Appellant urges thirteen points for reversal of the judgment, none of which, however, do we deem it necessary or essential to discuss, for the reason that it is now obvious that the bankruptcy court had absolutely no jurisdiction or control over the note, and that the bankrupt estate had no interest therein that could be so disposed of. [3] Under these facts, even a bankruptcy court possesses no such power that it can, by a pretended sale of a purported right to a note which it had never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before the payee named therein had been adjudged a bankrupt, deprive the maker thereof of such defenses thereto as he might interpose at the time it was so delivered as such collateral security.

We think, regardless of the claim that there is error in the record, finding no prejudicial error therein, that the judgment is eminently just. Particularly is this so when the entire record is viewed in the light of section 4½ of article VI of our constitution; for we cannot say that after an examination of the entire cause, including the evidence, we are of the opinion that the errors complained of have resulted in a miscarriage of justice.

Judgment affirmed.

Finlayson, P. J., and Weller, J., concurred.

[Civ. No. 2946. Second Appellate District, Division One.—May 28, 1920.]

E. P. LEWIS, Appellant, v. G. L. CRENSHAW,  
Respondent.

[1] **VENDOR AND VENDEE — TRANSFER OF PROPERTY AND CONTRACT AS SECURITY—LIABILITY OF GRANTEE TO VENDEE.**—The vendee of land, upon being notified by the grantee of his vendors, to whom the contract of sale was also assigned, that no further payments would be received, as there was some question about the title to the land (a proceeding to foreclose a prior mortgage of record having been instituted), is not entitled to recover from such grantee the payments made under the contract of purchase, where the latter took the deed and assignment merely as security for certain sums of money which he had paid out under a surety bond executed for the benefit of such grantors in connection with an independent leasing transaction and did not assume the obligations of his grantors.

[2] **TRIALS — ABRUPT MANNER OF TRIAL JUDGE — EFFECT ON APPELLANT'S COUNSEL—LACK OF PREJUDICE.**—A judgment will not be reversed on appeal because the trial judge, in expressing his rulings, spoke laconically, decisively, and with great brevity, where there is nothing to show that the disposition of the court was other than usual, or that any prejudice resulted to appellant which prevented him from showing that the facts were different from those appearing in the record, however much the abrupt manner of the trial judge may have been disconcerting to appellant's counsel.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

M. O. Graves for Appellant.

Hickcox & Crenshaw for Respondent.

**JAMES, J.**—In this case, at the conclusion of the hearing of the testimony on behalf of the plaintiff, the court granted a motion for judgment of nonsuit as to Crenshaw Security Company. At the conclusion of all the evidence the court directed the jury to find a verdict in favor of

the defendant G. L. Crenshaw. The cause was not tried as to the defendant Brent Investment Company, that defendant apparently not having been required to answer the complaint of the plaintiff. The appeal is from the judgment. Originally there were several suits brought against the same defendants by different individuals, all the claims being based upon similar facts and, by stipulation, all of said causes were agreed to be considered and determined at the trial had under the title first above given. As no useful purpose will be served in treating the matter otherwise, we will refer to the case in general as though there were but the one plaintiff interested herein.

[1] In May, 1914, the plaintiff entered into a contract with defendant Brent Investment Company, a corporation, by which contract, in consideration of the initial payment of a certain sum of money and monthly payments thereafter to be made until the whole sum mentioned in the contract was discharged, the Brent Investment Company agreed to convey to the plaintiff a certain parcel of land. Plaintiff made payment for a time of the various installments required to the Brent Investment Co. A notice was then received by him, which was in part as follows:

“Your contract with the Brent Investment Company for the purchase of Lot No. 52, in Tract 909, has been turned over to us. . . . Your future payments must be made to us and we wish you to be prompt according to the terms of your agreement. We wish you would bring your contract with you when you make next payment, so that we may compare amounts paid and see if the duplicate and original contracts agree. This will be a convenience to us as well as yourself.

Yours truly,

“G. L. CRENSHAW.”

That notice was dated May 30, 1916, and for a number of months thereafter plaintiff made payments to Crenshaw and received receipts for the account. After having so made payments to Crenshaw, plaintiff was notified by Crenshaw at his office that no more payments would be received, as there was some question about the title to the land. It appeared that on the 12th of October, 1911, Brent and his wife, who were evidently the owners of the entire tract, a parcel of which plaintiff had later contracted to buy,



had created a lien by mortgage against the same to secure a promissory note in the sum of \$29,507; that at about the time Crenshaw notified plaintiff that he would no longer receive payments on account of the contract referred to, foreclosure proceedings had been instituted on this mortgage. Having tendered payment of an installment and meeting with Crenshaw's refusal to accept the same, plaintiff brought this action to recover back the money theretofore paid to Brent Investment Company and to Crenshaw. It was shown in evidence that Crenshaw had become surety on a bond for a large amount for the benefit of the Brents in connection with the leasing of property in the city of Los Angeles by the Brents, the lease transaction being wholly disconnected from the property affected by the contract of plaintiff. Crenshaw had been required to pay out a large amount of money—a sum in excess of \$10,000—on account of his surety liability, and in order to protect him the Brents, at Crenshaw's suggestion and as security for the repayment of the amounts which Crenshaw had paid out under the bond referred to, executed their deed to the tract of land affected by the contract of plaintiff, conveying the same to Crenshaw, and also for the same purpose made assignment of the contracts of plaintiff and other similar holders. Crenshaw did not become a party to the contract of plaintiff, unless the effect of the assignment imposed that relation upon him. The evidence as heard by the court, however, was uncontradicted to the point that the transaction between the Brents and Crenshaw, whereby the deed was made and delivered and the assignment of the contract made, created a contract for security only. It was upon this state of the evidence that the court held as a matter of law that Crenshaw did not assume the obligation of the Brents toward the plaintiff; and upon that evidence we cannot perceive why any different conclusion should be contended for. The plaintiff and the other contract holders made their contracts with the Brent Investment Company, relying upon the ability of that company to perform its obligations, with full knowledge or means by which knowledge might be obtained as to the condition of the title to the property contemplated to be conveyed. They made no new contract with Crenshaw, Crenshaw did not indorse his name upon the contracts as assuming the obligations imposed upon the

vendors thereunder. The Brent Investment Company at all times remained liable as the contracting party and the only contracting party against whom the plaintiff was entitled to seek redress. If the plaintiff at the time of the transfer of the contract so made by the Brent Investment Company to Crenshaw had ascertained that the Brent Investment Company would be unable to comply with its contract and had been persuaded and induced fraudulently by Crenshaw to continue to make payments, it is possible some cause of action might have arisen in plaintiff's favor. No such cause of action is claimed or pleaded. Nor was there anything in the evidence to show that plaintiff no longer placed reliance upon the Brent Investment Company because of any reputed insolvency, or that he had any knowledge which gave him reason to believe that Crenshaw was financially responsible and his grantor was not. There was some testimony given on the part of the plaintiff and other contract holders to the effect that Crenshaw had stated that they would get their deed or their money back; but this was neither predicated upon any pleading proposing the issue suggested nor upon any further evidence showing that the plaintiff was induced because of such representation to continue making payments which he would otherwise not have made or been legally bound to make. On the statement of the case as the record shows it and as we have epitomized it in the foregoing, it must at once be clear that no right of recovery in the plaintiff existed as against Crenshaw or the Crenshaw Security Company; hence the court was entirely justified in the action taken.

[2] An objection is made that the court erred in admitting certain testimony and excluding other evidence offered; further, that the peremptory manner of the trial judge prevented plaintiff from having full and fair consideration in the presentation of his case. The trial judge, it may be stated, in expressing his rulings, spoke laconically, decisively, and with great brevity. However much the abrupt manner of the judge may have been disconcerting to plaintiff's counsel, there is nothing to show that the disposition of the court was other than usual, or that any prejudice resulted to the plaintiff which prevented him from showing that the facts were different from those as we have stated them. The trial judge was headed in the

right direction, and if he reached a legally logical conclusion, it makes little difference whether this end was arrived at by a short-cut or otherwise.

We have examined all of the assignments for error and are satisfied that no miscarriage of justice is expressed in the judgment as rendered.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

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[Civ. No. 3409. First Appellate District, Division One.—May 28, 1920.]

**KROGH MANUFACTURING COMPANY** (a Corporation),  
Respondent, v. **H. C. CHURCHILL et al.**, Appellants.

- [1] **EVIDENCE—ACTION FOR VALUE OF PUMP AND SERVICES—REASONABLE VALUE OF LABOR EXPENDED—EXPERT TESTIMONY.**—In this action to recover the value of a pump installed by plaintiff on the defendants' ranch, pursuant to a contract for the purchase of the same, and for services and accessories in connection with its operation, the court properly permitted the manager of the plaintiff, who, before becoming manager for the plaintiff, had for many years been engaged in the pumping and engine business, and as a designer and chief engineer of an iron works, to testify as an expert as to the reasonable value of the mechanical labor expended on the pump.
- [2] **ID.—SPEED OF OPERATION OF PUMP—PROPER CROSS-EXAMINATION.**—In such action, a witness called by the defendants to testify to certain work he had done on the pump after its installation who, on his direct examination, gave his expert opinion as to its construction and testified that in installing a pump it was necessary to regulate its capacity in accordance with the volume of water in the well, was properly allowed to be questioned, on cross-examination, regarding the speed of the pump in operation in relation to the amount of water in the well.
- [3] **ID.—CONTRADICTIONS IN TESTIMONY—PROVINCE OF TRIAL COURT.**—In such an action, contradictions in the testimony of the witnesses for the plaintiff and the defendant as to whether the pump was properly constructed and installed and the weight to be given to the testimony of each of the witnesses is a matter addressed to the discretionary consideration of the trial court.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Pat R. Parker, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

E. O. Leake and Goudge, Williams, Chandler & Hughes for Appellants.

Seth B. Smith for Respondent.

**WASTE, P. J.**—This is an appeal by the defendants from a judgment in favor of the plaintiff for the sum of \$1,384, the value of a pump, installed on the defendants' ranch, pursuant to a contract for the purchase of the same, and for services and accessories in connection with its operation.

The defendants denied any indebtedness to the plaintiff and alleged that, by reason of the poor quality of the materials used in, the bad workmanship thereon, and the improper, negligent, and careless manner of installing the machinery which was the basis of the second and third counts of the complaint, the pump broke down, never at any time ran in a satisfactory manner, or reasonably well, and was absolutely worthless to the defendants. By reason of these facts defendants claimed to have suffered a loss of their lemon crop for the year 1913, amounting to the sum of \$2,500, their orange and lemon groves being also damaged to the extent of \$720, by reason of their being unable to secure water to irrigate the same. To these amounts defendants added the amounts of various repair bills, and by way of cross-complaint, prayed for judgment against the plaintiff in the sum of \$3,701.16.

The lower court found that the plaintiff installed the pump and machinery on the defendants' ranch in a first-class and workmanlike condition, and duly performed all the conditions of its contract, with the exception that the eight-inch cylinder which the plaintiff first placed in the well became broken, by reason of inevitable accident, whereupon plaintiff replaced it with a seven-inch cylinder; that the pump thus equipped was accepted by the defendants, and was, at the time of its installation and at the time of

the trial, capable of pumping all the water in defendants' well, and of pumping twenty inches of water per minute, when pumping against a total head of 250 feet, as specified in the contract. It further found that the alleged breakdown and interruptions in the operation of the pump, subsequent to its installation, were not due to any defects in materials used by plaintiff in the construction of the pump, and were not due to, and did not result from, the manner in which the pump was constructed or installed, but, on the contrary, were due to the negligent and careless manner in which the defendants operated the pump, and to the negligence of the defendants' employees in overhauling same, and were further aggravated by lack of water in the defendants' well. The further findings were against the allegations of the cross-complaint, and the plaintiff was awarded judgment for the price of the pump as installed, together with \$74 for certain services, material, and pump accessories.

In seeking a reversal of the judgment the appellants specify certain errors in the admission of testimony, insufficiency of the evidence to sustain the findings, and that the decision was against law.

[1] Whether or not the witness F. L. Emerson, manager of the plaintiff, was sufficiently qualified to testify as an expert as to the reasonable value of the mechanical labor expended on the pump was a matter for the determination of the trial court, and in the instant case its determination of the question was undoubtedly correct. Before becoming manager for the plaintiff the witness had for many years been engaged in the pumping and engine business and as a designer and chief engineer of an iron works. [2] The question propounded to Joseph Darracq, a witness for the defendants, on cross-examination, regarding the speed of the pump in operation in relation to the amount of water in the well, was proper. He was called by the defendants to testify to certain work he had done on the pump after its installation, and gave his expert opinion as to its construction. He also testified that in installing a pump it was necessary to regulate its capacity in accordance with the volume of water in the well. While, as argued by the appellants, the question of exhausting the water in the well was not an issue, the successful method of the in-

stallation and operation of the pump under varying conditions was testified to by the witness on his direct examination.

[3] As to the alleged insufficiency of the evidence, a careful reading of the testimony of the various witnesses, experts and others, called to testify as to the manner in which the pump was installed, and its working when in operation, develops only a marked conflict of testimony, which it was the province of the trial judge to consider and determine. There was competent evidence on the one side that the pump was workmanlike in its construction and properly installed in a first-class manner, and that if properly handled it would give satisfaction. On the other hand, witnesses for defendants testified to the contrary. The contradictions in the testimony and the weight to be given to the testimony of each of the witnesses was a matter addressed to the discretionary consideration of the trial court.

The judgment is affirmed.

Welch, J., *pro tem.*, and Richards, J., concurred.

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[Civ. No. 3125. Second Appellate District, Division One.—May 28, 1920.]

MARION W. CHASTEK et al., Respondents, v. FRED S. ALBERTSON et al., Appellants.

[1] **BAILMENTS—POSSESSION OF AUTOMOBILE FOR PURPOSE OF APPRAISEMENT—FAILURE TO EXERCISE ORDINARY CARE.**—Where plaintiff delivered his automobile into the possession of defendants that they might appraise the same and determine what allowance would be made as a credit on the purchase of a machine which they were seeking to sell to plaintiff, ordinary care was required to be exercised by defendants in protecting plaintiff's property; and where one of the defendants, who was familiar with the lock with which the car was equipped and for which he had the key, took the machine into the business section of a large city and left it unattended and unlocked, and it was stolen, he failed to exercise ordinary care.

[2] **ID.—FAILURE TO REDELIVER CAR UPON DEMAND—ACTION FOR DAMAGES—PLEADING—JUDGMENT.**—Where the allegations in plaintiff's

complaint in an action against the defendants because of their failure to return such automobile upon demand to which no demurrer was interposed, while in general form, were appropriate to an action for conversion, and facts were alleged which showed that a bailment had been created and that the defendants refused to redeliver the property upon demand, the court was authorized to award plaintiff judgment for the amount it found represented the value of the machine.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Affirmed.

The facts are stated in the opinion of the court.

Overton, Lyman & Plumb, Wm. B. Himrod and George W. Prince, Jr., for Appellants.

Edward Brody and Charles A. Bank for Respondents.

JAMES, J.—Appeal by defendants from a judgment entered in favor of the plaintiffs by which an award was made for the value of an automobile.

In the complaint it was alleged that appellant Albertson was engaged in business under the name of Albertson Motor Company; that plaintiff Chastek was the owner of an automobile. This allegation followed: "That at the city of Los Angeles, state of California, and on or about the fourth day of May, 1918, the plaintiff Marion W. Chastek, at the special instance and request of the defendants, and each of them, placed the said automobile in the possession of the defendants, and each of them, as bailees, and subsequently thereto on the same day plaintiff Marion W. Chastek demanded the return of the said automobile of the said defendants, and each of them, and the defendants, and each of them, failed, neglected and refused and still fail, neglect and refuse to return the said automobile to plaintiff Marion W. Chastek to the damage of the plaintiffs in the sum of \$574." There was the further allegation that prior to the commencement of this action Chastek had assigned to his coplaintiff a one-half interest in the claim; and the prayer was for the recovery of \$574. Defendants, after making denial of the material allegations of the complaint, further answered, alleging that at the request of Chastek, defendants had taken possession of the automobile described in the

complaint for the purpose of examining and appraising the same and determining the amount that they would allow as a credit in part payment on a new motor car which plaintiff Chastek contemplated buying from defendants. The defendants alleged that while the automobile was in their possession for the purposes last set forth, the same was, without fault or negligence on their part, stolen and taken from their possession. In determining the first point as to whether the judgment is warranted by the evidence, we will consider the testimony, as we must, in its most favorable aspect toward the plaintiffs. [1] The plaintiff testified that he went to the place of business of the defendants with the idea of purchasing an automobile of which the defendants were the vendors; that he desired to "turn in" the Ford automobile which he owned, and defendants desired to "try out" the Ford automobile before finally determining what allowance would be made as a credit on the purchase of the machine which they were seeking to sell to the plaintiff. Plaintiff testified, in part, as follows: "When I came to Albertson's place of business I locked the car. When Mr. Hoover took the car to try it out I handed him the key. I don't think I unlocked the car for Mr. Hoover. I handed Mr. Hoover the key. Mr. Rall, the salesman, suggested that Mr. Hoover, the appraiser, try the Ford out, to see if they could allow me more than \$450. So Mr. Hoover took the Ford in order to appraise it. I saw Mr. Hoover leaving the place of business with my car, and I saw him again that day after the machine was stolen, when he came back to the Albertson Motor Company." On the part of the defendants, Hoover, the appraiser, testified that he took Chastek's machine, ran it into the central portion of the city of Los Angeles, and left it at the curb while he entered an office building to interview a man who desired to buy a Ford automobile of similar style and equipment to that of the plaintiff; that he was gone five or six minutes; when he returned the machine had been stolen. He testified further: "I don't know whether Mr. Chastek gave me the key to the car,—either he gave me the key or else he had left the car unlocked, because it was a Rex lock, and you can't take the key out unless you locked the car; so he either left it unlocked while he was there or else he gave me the key. I



don't remember. Mr. Chatsek either gave me the key to the car or I went out and found the key in the lock of the car. I do remember that I did not lock it when I got out." In arriving at a conclusion as to whether defendants, in view of the fact that the car was stolen, incurred any liability to Chastek, the question arises as to what degree of care was required to be exercised by them in the circumstances. Appellants contend that the bailment was gratuitous; hence that a slight degree of care only was required of them; and that the evidence did not show that they were guilty of gross negligence. The court determined that the bailment was for the mutual benefit of Chastek and defendants, and hence ordinary care was required to be exercised by the latter in protecting Chastek's property. We agree that this conclusion was the correct one to be drawn. The defendants received the automobile of Chastek in the course of the negotiation for a machine which they desired to sell to Chastek, and that they would be benefited by the transaction was only contingent upon an amount being agreed upon as a credit to be allowed Chastek which would be satisfactory to both sides. We think that the court was justified in concluding that ordinary care was not used for the protection of Chastek's automobile while it was in possession of the defendants. The machine was equipped with a lock, as to the operation of which Hoover, one of the defendants and the man who took charge of the machine appeared to be familiar. Chastek delivered the key of the lock to Hoover, and when he turned the machine over in front of the place of business of the defendants the lock was fastened. Hoover took the automobile into the business section of a large city, left it unattended and unlocked, and it was stolen. With very simple means at hand by which the machine could have been made more secure in the place where he left it, Hoover omitted altogether to make use of this means. It would seem to be clear beyond question that such act of his by no means satisfied the requirement of ordinary care.

[2] Neither do we think there is merit in the contention of appellants that the action as framed by the complaint was not appropriate to permit a recovery by the plaintiffs. While in general form the allegations were appropriate to an action for conversion, facts are alleged which show that

a bailment had been created and the refusal of the defendants to redeliver the property upon demand. Under the circumstances of this case, we feel well satisfied that in taking control of the automobile of Chastek, defendants assumed the obligation of a depositary. It was their duty, upon demand, to redeliver the same to plaintiff, in default of which they would become liable for the value of the property. (Civ. Code, sec. 1822.) The case assumed no different aspect in regard to the legal relation than that of the ordinary warehouse contract, in which cases action for the property itself or its value has been assumed to be the proper remedy. (*Morse v. Imperial Grain & Warehouse Co.*, 40 Cal. App. 574, [181 Pac. 815]; *Pope v. Farmers' Union Milling Co.*, 130 Cal. 139, [80 Am. St. Rep. 87, 53 L. R. A. 673, 62 Pac. 384].) The case of *Poggi v. Scott*, 167 Cal. 372, [51 L. R. A. (N. S.) 925, 139 Pac. 815], cited by appellants, is not, we think, inconsistent with the view here expressed. No damages were claimed herein beyond the value of the automobile which was lost, and the court expressly found that value to be the sum of \$500, for which judgment was awarded. No demurrer was interposed to the complaint; hence any special objections which might have been urged as to the completeness of the allegations thereof have been waived.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

## MEMORANDUM CASES.

[Civ. No. 3156. First Appellate District, Division One.—April 7, 1920.]

JAMES F. SHEEHAN, Respondent, v. BOARD OF POLICE COMMISSIONERS, etc., et al., Appellants.

[1] MUNICIPAL CORPORATIONS—SAN FRANCISCO—POLICE PENSION FUND—VESTED RIGHTS.—Judgment affirmed on the authority of *Sheehan v. Board of Police Commissioners*, ante, p. 29, [190 Pac. 51].

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge. Affirmed.

The facts are identical with those set forth in *Sheehan v. Board of Police Commissioners*, ante, p. 29, [190 Pac. 51].

George Lull, City Attorney, and Chas. S. Peery, Assistant City Attorney, for Appellants.

Charles J. Heggerty and Knight & Heggerty for Respondent.

THE COURT.—[1] The facts in this case are identical with those set forth in the case of *Sheehan v. Board of Police Commissioners*, ante, p. 29, [190 Pac. 51], and on the authority of that case the judgment is affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 3, 1920.

Angellotti, C. J., Wilbur, J., Lennon, J., and Sloane, J., concurred.

Shaw, J., Lawlor, J., and Olney, J., dissented.

[Civ. No. 3357. First Appellate District, Division Two.—May 22, 1920.]

THE IMPERIAL DEVELOPMENT COMPANY (a Corporation), Appellant, v. THE COUNTY OF IMPERIAL et al., Respondents.

[1] TAXATION—COTTON IMPORTED FROM MEXICO—RETENTION AND STORAGE BY IMPORTER IN ORIGINAL BALES—NONLIABILITY FOR STATE AND LOCAL TAXES.—Judgment reversed on the authority of *Imperial Development Co. v. City of Calexico*, ante, p. 666, except that this action involves a county tax sought to be levied.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Reversed.

The facts are identical with those presented in *Imperial Development Co. v. City of Calexico*, ante, p. 666, [191 Pac. 50].

Louis Lamy for Appellant.

E. R. Simon, District Attorney, for Respondents.

LANGDON, P. J.—This is an appeal by the plaintiff from a judgment against it in an action to have certain taxes assessed against its property by the assessor of the county of Imperial declared illegal and void, and for general relief. The facts are identical with the facts in the case of *Imperial Development Co. v. City of Calexico* (No. 3356), ante, p. 666, [191 Pac. 50], except that this action involves a county tax sought to be levied, while No. 3356 involves a city tax sought to be leveled. [1] The questions of law involved are identical, and for the reasons set forth in the decision this day rendered in case No. 3356, the judgment herein is reversed, with instructions to the trial court to render judgment for the plaintiff declaring the tax illegal and void, and for a return of the property held, or of the money collected by the assessor, as the facts may warrant.

Nourse, J., and Brittain, J., concurred.

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**ABANDONMENT.** See *Insolvency*, 9.

**ACCOUNTING.** See *Partnership*, 1, 3.

## **ACCOUNTS.**

1. **RECIPROCAL DEMANDS—STATUTE OF LIMITATIONS.**—An account showing on one side the different items furnished and amounts paid by one person for the joint benefit of himself and another, and on the other side the different items furnished and amounts paid by the latter for like purposes, a balance being shown in favor of the former, constitutes a mutual account; and an action thereon commenced within four years from the date of the last item thereof is not barred by the statute of limitations. (*Dyer v. Minturn*, 1.)
2. **ACTION AGAINST EXECUTOR—CORRECTNESS OF BOOKS AND CLAIM—EVIDENCE ADMISSIBLE.**—In an action against an executor upon mutual, open, and current account against the deceased, while the plaintiff is prohibited by subdivision 3 of section 1880 of the Code of Civil Procedure from testifying as to the correctness of his books, or that the entries therein made are true and correct, it is not error to permit him to testify that the account embodied in the rejected claim sued on corresponds with the account in his books. (*Id.*)
3. **NONPAYMENT—PLEADING—PROOF.**—While, in such an action, the plaintiff must plead nonpayment of the debt sued upon, such allegation need not be proved, but the burden of proof of payment is upon the defendant; therefore, prejudicial error is not committed in allowing the plaintiff to testify that the account has not been paid. (*Id.*)
4. **BOOKS OF DECEASED—CORRESPONDENCE OF CLAIM WITH—EVIDENCE.**—In an action against an executor upon a mutual, open, and current account against the deceased, it is not error, in violation of subdivision 3 of section 1880 of the Code of Civil Procedure, for plaintiff to call the executor as a witness and prove by him that the claim sued upon corresponds with the books kept by the deceased. Such evidence does not involve or relate to a "matter of fact occurring before the death of the deceased." (*Id.*)
5. **ACTION ON—BALANCE DUE—NONPAYMENT—EVIDENCE.**—In this action against an executrix and executor upon a mutual, open, and

**ACCOUNTS (Continued).**

current account against the deceased, that there was a balance due plaintiff was proved by the introduction in evidence by the defendants of the books of the deceased, supplemented by the testimony of the defendants' witness that the account sued upon was "substantially the same" as the account shown by the books of the deceased. Proof of payment of the balance due was a matter resting upon the defendants. (Id.)

**6. ACTION FOR BALANCE DUE—ADMISSIBILITY OF LEDGER ACCOUNT.—**

In an action upon a mutual, open, and current book account to recover the balance due and owing to plaintiff for the picking, hauling, washing, packing, and shipping of defendant's oranges during a specified season, the ledger account contained in a book kept by the plaintiff and showing its account with defendant is admissible, where the entries made in such book by the secretary and general manager of the plaintiff association from information furnished him by other employees of plaintiff, all of which was in the usual course of business of the plaintiff, were the original and only entries made by the plaintiff. (*Sugar Loaf O. G. Assn. v. Skewes*, 470.)

**7. SALE OF CROP OF ORANGES—AUTHORITY OF GROWERS' ORGANIZATION TO PAY LOSSES—LEDGER ENTRIES FROM "ACCOUNT SALES."—**

Duplicate copies of "account sales" showing the receipts from the sales of a given crop of oranges and the charges for freight, refrigeration, and auction commissions, received by a growers' organization in the usual course of business from the organization which acted as the selling agent, constitute a reasonable basis of authority to such growers' organization to pay out the balance charged to it on the loss incurred by the sales of the crop of the grower and to charge the latter the amount so paid out by it for his account; and the ledger entries made by such growers' organization in the book kept by it showing its account with such grower may be regarded as the original entry of its account against such grower. (Id.)

See *Estates of Deceased Persons*, 3, 4.

**ACCOUNT STATED.****1. STATEMENT OF BALANCE DUE—PROMISE TO PAY—CONSTRUCTION OF**

**WRITING.**—In this action to recover money alleged to be due on an account stated, a statement of account mailed by defendant to plaintiff showing the result of certain financial transaction in which plaintiff and defendant were jointly interested, which account closed with a statement of a balance due plaintiff, considered in connection with defendant's accompanying statement as to when he would pay the same, and his subsequent statements, constituted an account stated. (*Linell v. Gordon*, 691.)



**ACCOUNT STATED (Continued).**

2. **PROMISE TO PAY WITH INTEREST—IMPLICATION.**—A promise by one person to pay another "with interest" implies a debt due from the former to the latter. (Id.)

**ACTIONS.**

**SEVERAL ALLEGED GROUNDS OF INVALIDITY—INCORPORATION IN ONE ACTION.**—A party who seeks to set aside deeds cannot commence and maintain against the same parties as many consecutive, independent suits to accomplish that purpose as he has grounds upon which to make the attack, but he must embody all of his alleged grounds of invalidity in one action. (*Little v. Smith*, 8.)

See *Automobile Insurance*, 6.

**ADMISSIONS.** See *Negligence*, 44; *Pleading*, 2.

**ADVERSE POSSESSION.**

1. **USE OF UNINCLOSED LAND FOR GRAZING.**—The exclusive use of uninclosed land for grazing during the grazing season may constitute adverse possession. (*Perry v. Cohn*, 19.)
2. **ACTION TO QUIET TITLE—EXCLUSIVE AND OPEN POSSESSION—EVIDENCE.**—In this action to quiet title to certain uninclosed land, the evidence as to the use of the land by defendants' lessee during a portion of each year for the statutory period of years, coupled with the testimony of such lessee, who lived on the adjoining land, that the land in controversy was not occupied by anyone else during the period it was not in use by him, was sufficient to support the finding of the trial court that the defendants had maintained an exclusive and open possession for the statutory period. (Id.)
3. **AUTHORITY OF BROTHER TO ACT AS AGENT—EVIDENCE.**—In such action, the evidence having shown that the land was purchased at a tax sale by one of the defendants for the other defendant, a brother, that the former was the general agent to transact all kinds of business for the latter in the county, that as such agent he rented the property for the latter and paid all taxes on the property from the time of its purchase at the tax sale until the latter conveyed the property to him, such evidence, taken in connection with the ratification contained in the deed and the inferences which could properly be drawn from the entire evidence, was sufficient to justify the conclusion of the trial court that the defendant to whom the property was conveyed was authorized to represent his brother to the extent that adverse possession might be acquired through such agency. (Id.)

**ADVICE OF COUNSEL.** See *Malicious Prosecution*, 1.

**AFFIDAVITS.** See Appeal, 8; Arrest, 1, 2.

**AGENCY.**

1. **FORWARDING AGENT—DEPOSIT OF GOODS WITH—SERVICES UNDERTAKEN—RELATION OF COMMON CARRIER.**—If goods are deposited with a forwarding agent merely as the initiatory step toward starting them in *itineris*, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in nowise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier. (*Heath v. Judson F. Forwarding Co.*, 426.)
2. **LIABILITY OF COMMON CARRIER ASSUMED.**—Where a forwarding agent undertakes to transport property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its distributing agent at the point of destination, such forwarding agent assumes, while holding the property for accumulation, the liability of a common carrier. (*Id.*)
3. **RELATION TO OWNER—CARRIAGE OF GOODS TO DESTINATION—ABSENCE OF OWNER'S CONSENT.**—Irrespective of whether its relation to the owner of the shipment be that of a common carrier or a mere forwarder, a forwarding company that, for hire, undertakes the carriage of goods of another in a car of its own selection, and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to the place of destination, as contracted for, against the owner's consent. (*Id.*)
4. **RIGHT OF CONTROL OVER GOODS—STOPPAGE IN TRANSIT—LIABILITY OF OWNER FOR SERVICES NECESSITATED.**—The owner does not renounce his right of all control over his goods by their delivery to a common carrier or to a forwarder, but the latter stands in the relation of one employed as a bailee of goods for the purpose of obeying instructions of the owner regarding them and, subject to the payment of a reasonable charge for the services necessitated by his order, the owner has the right either to stop the goods in transit or to stop their shipment before actual transportation has commenced. (*Id.*)
5. **LOADING OF GOODS ON CAR—RIGHT TO REDELIVERY—EXPENSES OF UNLOADING—LIABILITY FOR LIEN.**—Where the forwarding company has loaded the owner's goods on a car before receiving instructions to hold the shipment, but the goods, without any very great inconvenience, can be taken from the car at an expense not out of proportion to their value, the owner is entitled to a redelivery of the goods at the point of shipment, the forwarding company being allowed to charge a reasonable sum to compensate

**AGENCY (Continued).**

it for its trouble in taking the goods from the carload, to secure which charge it has a lien on the goods. (Id.)

6. **INSTRUCTIONS TO HOLD SHIPMENT—REFUSAL TO OBEY UNJUSTIFIED—AUTHORIZATION TO UNLOAD NOT NECESSARY.**—Where a forwarding company, after it has loaded the goods on the car but before such car has started, receives definite instructions from the owner to hold the shipment, and such goods can be taken from the car at an expense not out of proportion to their value, the forwarding company is not justified in refusing to obey such instructions because, within a time specified by it, it does not receive a reply to its telegram wherein the owner, after being advised that the goods are already loaded and the cost of unloading, is asked if he authorizes unloading. (Id.)

7. **HUSBAND AND WIFE—RATIFICATION OF HUSBAND'S ACTS—AGENCY—EVIDENCE.**—The act of the wife in merely signing her name to certain documents affecting the title to real property standing in her husband's name, to facilitate his business, cannot be held to constitute a ratification by her of all previous acts of her husband in his own behalf, as having been done by him as her agent; neither can the fact that on previous occasions the husband has procured his wife's signature to notes, and that she had thereby become personally obligated thereon, of itself operate to constitute him her agent for all time and for all purposes, so as to render her personally bound by his acts. (*McConnell v. Estate of Gaut*, 454.)

See Accounts, 7; Adverse Possession, 3; Arrest, 1; Corporations, 5; Husband and Wife, 1, 3, 4; Leases, 3, 4; Negligence, 4; Promissory Notes, 18.

**ALIENATION OF AFFECTIONS.**

1. **LETTERS TO WIFE—ADMISSIBILITY OF.**—In an action by a husband for the alienation of his wife's affections, letters written by defendant to plaintiff's wife which show that defendant was, and for some time had been, by no means a passive agent in the love-making, and which tend to corroborate her testimony that defendant made love to her, gained her affections and encouraged her in a plan to obtain a divorce from her husband and marry him, are relevant and competent evidence, where defendant, for defense to the action, pleads and attempts to prove that he is the victim of a conspiracy and that the woman tempted him, notwithstanding such letters did not reach the wife but were intercepted by the husband before their delivery through the mails. (*Pratt v. Harrold*, 166.)
2. **COMPETENCY OF WIFE AS WITNESS.**—In an action by a husband for the alienation of his wife's affections, the wife is a competent witness. (Id.)

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ALIMONY. See Maintenance, 2; Place of Trial, 2.

## ANIMALS.

1. **ATTACK BY DOG—ACTION FOR DAMAGES—CONFLICTING EVIDENCE—FINDING—APPEAL.**—Where, as in this action to recover for injuries caused by the attack of a dog belonging to the defendants, in which there was sufficient evidence to warrant the jury in finding that the dog was vicious and that the defendants were aware of its viciousness, the appellate court will not disturb the verdict, notwithstanding there was a conflict in the testimony on the question. (*Bowden v. Herberger*, 555.)
2. **PROOF REQUIRED—IGNORANCE BY PLAINTIFF OF CHARACTER OF DOG—INSTRUCTIONS.**—In such an action, a requested instruction "that the plaintiff's evidence must be sufficient to sustain the allegations of the complaint as to the vicious character of the dog and the defendants' knowledge thereof, and the plaintiff's ignorance thereof," is properly modified by striking therefrom the words "and the plaintiff's ignorance thereof." The owner of an animal, not naturally vicious, is liable for injury done by the animal if it was in fact vicious and the owner had knowledge of that fact. (*Id.*)
3. **MISCHIEVOUS PROPENSITY OF DOG—INSTRUCTIONS.**—In such an action, the use of the word "mischievous" in an instruction, given at the request of the plaintiff, that "before the plaintiff can recover you must find from the evidence, first, that the dogs before the biting, or alleged biting of the plaintiff complained of, were of a vicious, *mischievous* propensity, and accustomed to biting mankind. Second, that the defendants had knowledge or notice of these characteristics," do not add to or detract from the efficacy of the instruction. (*Id.*)

## APPEAL.

1. **INFERENCES DRAWN BY TRIAL COURT—REVIEW ON APPEAL.**—It is not within the power of the appellate court to disregard, or set aside, the findings of the trial court where, as against the deductions drawn by the trial court, which seem eminently reasonable, no other inferences founded on facts proved in the case find support. (*Dibble v. San Joaquin L. & P. Corp.*, 112.)
2. **SUBROGATION — ASSIGNMENT — PARTIES — PLEADING.**—The insurance company, after payment of the loss caused by the negligence of a third person, being subrogated to the rights of the insured to the extent of its payment, may assign that right to the insured; and in a subsequent action by the insured against such third person, it is not necessary that the insurance company be joined in the action, either as plaintiff or defendant, or that the assignment by the insurance company to plaintiff be pleaded. (*Id.*)
3. **REQUEST FOR REPORTER'S TRANSCRIPT—TIME—DISCRETION OF TRIAL COURT.**—Where a party dissatisfied with the judgment of the trial

**APPEAL (Continued).**

court gives notice of his intention to move for a new trial, and such proceeding is terminated by the expiration of the three months' period prescribed by section 660 of the Code of Civil Procedure, but notice of such termination is not given or waived, the trial court acts within its discretion in approving the reporter's transcript of the record, notwithstanding request therefor was not made within ten days after the termination of the new trial proceedings, no undue delay having been caused. (*Stoner v. Security Trust Co.*, 216.)

4. **ACTION FOR DAMAGES—NEW TRIAL AS TO SINGLE ISSUE—ABSENCE OF APPEALABLE JUDGMENT.**—In an action for damages for breach of contract to render personal services, where a motion for a new trial is granted and a new trial ordered as to the issue or issues presenting a question of the amount of damages suffered by the plaintiff, and as to all other issues the motion for a new trial is denied, nothing effective as a judgment remains in existence; and an attempted appeal "from the whole of the said judgment, except the part and portion thereof vacated by the order of the said court," etc., must be dismissed. (*Universal Film Mfg. Co. v. Kerrigan*, 255.)
5. **FAILURE OF APPELLANT TO PRINT RECORD.**—Under the amendment of 1919 to section 953c of the Code of Civil Procedure, the omission of an appellant to print in her brief or in a supplement thereto such portions of the record as she desires to call to the attention of the court does not permit of a dismissal of the appeal. (*Kinderman v. Shipley*, 270.)
6. **FAILURE TO ANSWER RESPONDENT'S STATEMENTS—ASSUMPTION.**—Where, in reply to the appellant's contention that the judgment of the trial court is erroneous, in so far as it found in favor of respondent the matters alleged in his supplemental complaint, the respondent states that it was the understanding of the trial court and himself that the stipulation of the appellant was that judgment as to those matters should follow the judgment on the matters alleged in the complaint, and such statement is neither answered nor denied, it will be assumed that the appellant concedes the truth of such statement and that the judgment of the trial court was proper. (*Arnold v. La Belle Oil Co.*, 290.)
7. **INSUFFICIENT PRESUMPTION OF POINTS.**—The appellate court cannot be expected to search the record for grounds of alleged error, where neither argument nor authority, nor any reference to the evidence whatsoever, is urged by the appellant in support of her contentions. (*Willits v. Helmer*, 309.)
8. **PLACE OF TRIAL—AUTHENTICATION OF AFFIDAVITS.**—Affidavits used on a motion for a change of place of trial must be identified and authenticated by the trial judge before they can be considered by

**APPEAL (Continued).**

- the appellate court on an appeal from an order denying such motion. (*Espinosa v. Gould*, 316.)
9. **PREPARATION OF SUPPLEMENTAL TRANSCRIPT—POWER OF APPELLATE COURT TO DIRECT.**—Where an appeal is taken by the alternative method under section 953a of the Code of Civil Procedure, the appellate court cannot direct the preparation of a supplemental transcript containing matters not brought before it by reason of the failure of the appellant to give the proper notice to the clerk of the trial court. (*Id.*)
10. **INCOMPLETE RECORD ON APPEAL—PRESUMPTION.**—Where the record on appeal from an order refusing to change the place of trial shows that documentary evidence was used and testimony given on the hearing of the motion, but such evidence and testimony does not appear in the record on appeal, the appellate court has the right to and will assume, in the absence of any showing to the contrary, that the ruling of the trial court was proper. (*Id.*)
11. **NOTICE OF—ERROR IN DATE—PARTY RESPONSIBLE—EFFECT OF.**—Where the prevailing party, in giving notice of decision and entry of judgment, makes an erroneous statement as to the date, and the adverse party, in giving notice of appeal, states that he appeals from a judgment entered on that date, the prevailing party will not be heard to urge that such notice of appeal is ineffectual. (*Patterson v. Blackburn*, 362.)
12. **ACTION FOR RENT—CONFLICTING EVIDENCE—FINDINGS.**—On an appeal from a judgment in favor of the plaintiff, in an action by the lessor against the trustees for the lessee, whom the lessor permitted to occupy the leased premises after the lessee became insolvent, such trustees agreeing to pay plaintiff the back rentals then due out of the first profits of the business, a finding of the trial court based upon conflicting evidence, to the effect that the defendants during their conduct of the business received sufficient moneys to have enabled them under the terms of their agreement with plaintiff to pay him the amount claimed to be due as rental for the premises, but that they used and disposed of such moneys in payment of other than necessary expenses of conducting and operating the business to an extent and in an amount sufficient to have paid plaintiff the amount due him, is conclusive on the appellate court. (*Ramish v. Reichenbach*, 395.)
13. **REJECTION OF TESTIMONY—INCOMPLETE RECORD ON APPEAL—PRESUMPTION IN FAVOR OF RULING.**—Where the record on appeal in such action shows that the trial court refused to permit the defendants to introduce testimony in support of the allegations of their cross-complaint concerning a prior transaction, on the ground that the condition of the evidence was such that they were not entitled to introduce any evidence whatever regarding such former

## APPEAL (Continued).

transaction, but such record does not contain all the testimony heard at the trial, it must be presumed that the condition of the case was such as to support the ruling. (*Boland v. Smith*, 404.)

14. **ALTERNATIVE METHOD—DUTY OF REPORTER TO MAKE AND FILE TRANSCRIPT.**—Where an appeal is taken under the alternative method provided by sections 953a and 953b of the Code of Civil Procedure, it is the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given and the bond provided for in said sections has been filed, and to file such transcript with the clerk. He cannot refuse to so file because his fees remain unpaid. (*Harris v. Burt*, 430.)
15. **REFUSAL OF REPORTER TO PREPARE TRANSCRIPT—DUTY OF APPELLANT—DISMISSAL OF APPEAL.**—Where an appeal is taken under such alternative method and the stenographic reporter refuses to make a transcript of the report of the trial until his fees are paid in advance, the appellant, with knowledge of such refusal, should take legal steps, by *mandamus* or otherwise, to compel the reporter to act, and if he does not do so, and the clerk's and the reporter's transcripts are not filed in the appellate court within the time provided by law and the rules of the supreme court, a motion to dismiss the appeal will be granted. (*Id.*)
16. **JUDGMENT—REASONS FOR DECISION—RECORD.**—Reasons stated by a judge in deciding a case are no part of the judgment and have no place in the record, and, therefore, present nothing to be considered in reviewing a judgment on appeal therefrom. (*In re Cruickshank*, 496.)
17. **FORMER JUDGMENT—SUBSEQUENT DEPARTURE FROM DOCTRINE ANNOUNCED—LAW OF CASE.**—A final judgment of the district court of appeal in a given case (a hearing in the supreme court being denied) constitutes the law of the case on a second appeal, notwithstanding that subsequent to the time such judgment became final, but prior to the second appeal, the doctrine of the decision of the district court of appeal on the first appeal is departed from by the supreme court in a different case. (*Hubbard v. Jurian*, 543.)
18. **REVERSAL—RECOVERY COSTS—SERVICE OF COST BILL ON COAPPELLANT UNNECESSARY.**—Where the *remittitur* provides "the appellants to recover costs on this appeal," it does not allow one appellant to recover costs from another appellant, but only from the respondent, such coappellants not being adverse parties, notwithstanding they took separate appeals and the judgment of the appellate court results in the reduction of judgment as to one and an increased judgment against the other; and in such case it is not necessary for the former to serve a copy of its cost bill on appeal on the latter. (*Id.*)

## APPEAL (Continued).

19. **ALTERNATIVE METHOD—ABSENCE OF JUDGE'S CERTIFICATE.**—Where an appeal is taken under the alternative method, but the judge's certificate is not attached to the reporter's transcript, in accordance with the provisions of section 953a of the Code of Civil Procedure, the appeal must be considered by the appellate court merely as an appeal upon the judgment-roll alone. (*Kibbe v. Graves*, 575.)
20. **EXCESSIVE JUDGMENT—NECESSITY FOR REVERSAL.**—In an action to recover for amounts of salary alleged to be unpaid, where the amount for which the court gave judgment is in excess of the amount shown by the evidence to be due to the plaintiff, which condition arose through an error in the findings of fact, the judgment must be reversed by the appellate court, as it cannot direct an amendment of findings of fact. (*Hyman v. Karl Stern*, 605.)
21. **PRESENTATION OF POINTS—INSUFFICIENCY OF BRIEFS.**—The appellate court is not called upon to consider objections to the judgment and action of the trial court which are merely stated without citation of authority, or any argument beyond the bare statement of the point. (*Bar Due v. Cox*, 713.)

See Attorney at Law, 2, 3; Claim and Delivery, 3, 8; Common Carriers, 3; Contracts, 30; Corporations, 3; Criminal Law, 12, 13; Default, 4; Divorce, 6; Evidence, 4; Husband and Wife, 8; Judgments, 6, 10, 11, 22, 25, 26; Maintenance, 1; Mortgages, 3; Negligence, 15, 21, 22, 29, 32, 33, 39; New Trial, 4; Pleading, 1; Promissory Notes, 3; Street Law 3; Trial, 3.

**APPEARANCE.** See Judgments, 26.

**ARBITRATION.** See Contracts, 1.

**ARCHITECTS.** See Contracts, 22.

**ARREST.**

1. **ARREST AND BAIL—CONVERSION IN COURSE OF EMPLOYMENT—ESSENTIAL OF AFFIDAVIT.**—An essential of an affidavit, to justify an order of arrest under subdivision 2 of section 479 of the Code of Civil Procedure, is that the misappropriation or conversion of the property occurred in the course of the defendant's employment as agent of plaintiff. It is not sufficient to state that he was such agent at the time the property came into his possession. (*In re Gillett*, 107.)
2. **FRAUDULENT CONVERSION—WANT OF KNOWLEDGE BY AFFIANT—SUFFICIENCY OF AFFIDAVIT.**—An affidavit charging fraudulent conversion substantially in the language of subdivision 4 of section 479 of the Code of Civil Procedure is insufficient to justify



**ARREST (Continued).**

an order of arrest, where it is apparent therefrom that affiant has no personal knowledge of how or why or when, if at all, defendant disposed of plaintiff's property. (Id.)

See Criminal Law, 2.

**ASSAULT WITH DEADLY WEAPON.** See Criminal Law, 13.

**ASSIGNMENTS.** See Appeal, 2; Contracts, 15; Corporations, 4; Leases, 4; Mortgages, 3-6; Negotiable Instruments, 1; Patents, 1; Quieting Title, 2; Security, 1.

**ATTACHMENT.****1. DETENTION UNDER ATTACHMENT BY SHERIFF—THIRD PARTY CLAIM.**

Where property is wrongfully taken on attachment, the sheriff is absolved from liability for its detention prior to the filing of a third party claim, as provided in section 689 of the Code of Civil Procedure. (*Mutch v. Long Beach Imp. Co.*, 267.)

**2. ACTION ON FOREIGN JUDGMENT.**—Section 537 of the Code of Civil Procedure does not authorize an attachment to be issued in an action brought in this state upon the liability created by a judgment entered in favor of the plaintiff and against the defendant in another state. (*Erickson v. Erickson*, 319.)

See Estates of Deceased Persons, 1; Guaranty, 4.

**ATTORNEY AT LAW.****1. DISTRIBUTION OF NOTE TO LEGATEE—RUNNING OF STATUTE OF LIMITATIONS—NEGLIGENCE—LIABILITY.**—Where the legatees under a will, without waiting for a formal distribution by order of the probate court, upon their legacies becoming due and payable, enter into an agreement among themselves for the division and distribution of the property which consists, among other things, of a promissory note, and the property is accordingly divided and distributed, the attorneys for the executrix have no further concern therewith, and if, thereafter, the person who receives the promissory note allows the statute of limitations to bar an action thereon, that fact cannot give rise to a claim for damages against the attorneys. (*Wilmot v. Moody*, 156.)**2. FRAUDULENT REPRESENTATIONS—ACTION FOR DAMAGES—CONFLICTING EVIDENCE—FINDING—APPEAL.**—In an action for damages for the alleged fraudulent representations of an attorney to the effect that a loan made to him would be secured by a mortgage, and that such mortgage had been executed as promised and was in the bank, the defendant having testified that the loan was made to him upon his personal note upon the understanding that no security was to be given, and that testimony having found support in the physical circumstances of the transaction, a finding of the

**ATTORNEY AT LAW (Continued).**

trial court in accordance with such testimony cannot be disturbed on appeal. (Id.)

3. **DISBARMENT PROCEEDINGS—CONFLICTING EVIDENCE—APPEAL.**—In a proceeding for the disbarment of an attorney at law, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had. (In re Cruickshank, 496.)
4. **MISAPPROPRIATION OF MONEY—PROOF REQUIRED.**—Section 1110 of the Penal Code, which specifies the character of proof required in order to convict one of false pretenses, is not applicable in a proceeding for the disbarment of an attorney at law based on the misappropriations of money intrusted to him. (Id.)
5. **EXISTENCE OF PARTNERSHIP—ABSENCE OF DEFENSE.**—The fact that a partnership existed between them would not constitute a defense to a proceeding brought against an attorney at law to have him disbarred for acts constituting moral turpitude in defrauding or misappropriating the money of his partner. (Id.)

See License Taxes, 1; New Trial, 4.

**ATTORNEY'S FEES.** See Divorce, 2, 3, 9; Estates of Deceased Persons, 1, 2; Husband and Wife, 2, 4; Maintenance, 1; Place of Trial, 2; Promissory Notes, 14-16; Workmen's Compensation Act, 1.

**AUTOMOBILE INSURANCE.**

1. **CONSTRUCTION OF LETTER AND POLICY TOGETHER.**—In this action on a policy of automobile insurance, a letter from the insurance company to the assured confirming the statements of one of its solicitors as to the protection given by that company and in which it agreed to insure against certain risks was properly held to constitute a part of each and every contract of insurance entered into by the assured after the date of such letter, unless expressly excluded from said contracts, where said policies were taken out in reliance thereon, notwithstanding said policies contained provisions in conflict therewith. (Buxton v. International Indemnity Co., 583.)
2. **USE OF WORD "STEAL" IN BROAD SENSE—INTENTION OF PARTIES—CONSTRUCTION OF POLICY.**—Where, from an examination of all the provisions of a policy of automobile insurance in the light of the circumstances connected with and preceding its issuance, such as the statements of the assured as to the risks he desired insurance against and the statements of the insurance company and its solicitor as to the protection given, it is apparent therefrom that the word "steal," used by the insurance company in referring to the risks it would insure against, was intended to cover

**AUTOMOBILE INSURANCE (Continued).**

every form of wrongful taking by a conditional vendee, and not merely larceny, the policy will be construed accordingly. (Id.)

3. **ACTION ON POLICY—REFORMATION OF CONTRACT—RECOVERY—PLEADING.**—A complaint seeking to revise or reform a contract and also to recover upon or enforce the same as revised or reformed states but one cause of action. (Id.)
4. **PROOF OF LOSS—WAIVER—PLEADING.**—In an action on a policy of automobile insurance, the complaint is sufficient, although no proof of loss is pleaded, where plaintiff pleads facts which constitute a waiver of proof of loss and these facts are not denied by the defendant. (Id.)
5. **PLEADING CONTRACT ACCORDING TO LEGAL EFFECT—DENIAL OF ALLEGATIONS—ISSUES.**—Where the plaintiff, in such an action, pleads the contract of insurance according to its legal effect and such allegations are denied by the defendant, a finding of the trial court with relation to the intention of the parties to the contract in using a particular word, in defining the protection given, is within the issues made by the pleadings. (Id.)
6. **EVIDENCE—BURDEN OF PROOF.**—An action to recover under a policy of automobile insurance against theft is a civil action and plaintiff is required to prove his case only by a preponderance of the evidence the rule being the same as it is in civil cases generally. (Id.)
7. **ATTEMPT TO RECOVER PROPERTY—PAYMENTS TO DETECTIVE AGENCY—RECOVERY OF.**—Where a policy of automobile insurance expressly provides that any act of the insured in recovering, saving, and preserving the property in case of loss or damage shall be considered as done for the benefit of all concerned and that all reasonable expenses thus incurred shall constitute a claim under the policy, the assured is entitled to recover the amount paid a detective agency in attempting to recover the property. (Id.)
8. **EQUITY OF VENDOR—INSURANCE OF—INTEREST—JUDGMENT.**—Where the interest or equity of the assured in the automobile is the amount of the unpaid installments plus interest thereon, the conditional sale contract having provided for the payment of interest on all deferred payments from the date of the contract, and the policy of insurance provides for the protection of that equity, the insurance company, in an action on such policy, may not object to the allowance of such interest in the judgment. (Id.)

**AUTOMOBILES.** See Automobile Insurance, 1, 2; Conversion, 3; Negligence, 14-16; Sales, 1.

**BAIL.**

**FORFEITURE BY RECORDER—RIGHT OF COUNTY TO MONEY—PAYMENT TO CITY—ACTION TO RECOVER—WANT OF DEFENSE.**—Money collected

**BAIL (Continued).**

as a forfeiture of bail for nonappearance to answer a felony charge before a recorder of a city of the sixth class, sitting as a magistrate of the county, belongs to the county and not the city; and the fact that such magistrate has mistakenly paid out such money, even in good faith, to the city, does not constitute a defense to an action by the county to recover the same. (*County of Tulare v. Fenn*, 413.)

**BAILMENTS.**

1. **POSSESSION OF AUTOMOBILE FOR PURPOSE OF APPRAISEMENT—FAILURE TO EXERCISE ORDINARY CARE.**—Where plaintiff delivered his automobile into the possession of defendants that they might appraise the same and determine what allowance would be made as a credit on the purchase of a machine which they were seeking to sell to plaintiff, ordinary care was required to be exercised by defendants in protecting plaintiff's property; and where one of the defendants, who was familiar with the lock with which the car was equipped and for which he had the key, took the machine into the business section of a large city and left it unattended and unlocked, and it was stolen, he failed to exercise ordinary care. (*Chastek v. Albertson*, 788.)
2. **FAILURE TO REDELIVER CAR UPON DEMAND—ACTION FOR DAMAGES—PLEADING—JUDGMENT.**—Where the allegations in plaintiff's complaint in an action against the defendants because of their failure to return such automobile upon demand to which no demurrer was interposed, while in general form, were appropriate to an action for conversion, and facts were alleged which showed that a bailment had been created and that the defendants refused to redeliver the property upon demand, the court was authorized to award plaintiff judgment for the amount it found represented the value of the machine. (*Id.*)

See Contracts, 24-26.

**BANKRUPTCY.** See Negotiable Instruments, 3.

**BANKS AND BANKING.**

1. **FORGED INDORSEMENT OF CHECK—PAYMENT BY BANK—LIABILITY TO DEPOSITOR.**—A bank has no right to charge a depositor's account with the amount of a check upon the forged indorsement of the name of the payee. (*Bennett v. First Nat. Bank*, 450.)
2. **LOAN ON FORGED NOTE AND MORTGAGE—LIABILITY TO REPAY LENDER.**—Where a person falsely represents himself to be the agent of the owner of certain real property and that such owner desires a loan of a given amount to be secured by a mortgage upon such property, and, upon the production of a note and mortgage purporting to be executed by such owner, both of which documents

**BANKS AND BANKING (Continued).**

are in fact forged instruments, a loan is made, the lender, by delivering to the purported agent a check payable to his order, which the latter in due course cashes, creates only a personal liability on the part of the latter to repay the same. (Id.)

3. **PAYMENTS BY FORGER TO DEPOSITOR—RIGHT OF BANK TO CREDIT.**—In an action against a bank to recover a sum which it charged to plaintiff's account upon the payment by it of a check drawn by plaintiff on it upon a forged indorsement of the name of the payee, the bank is not entitled to have applied in liquidation of its liability to plaintiff the amount paid by the person who committed the forgery to plaintiff in settlement of a personal liability, where the funds used in making such payment were derived from a source other than the proceeds of forged check. (Id.)

See Promissory Notes, 1, 4-6.

**BILL OF EXCEPTIONS.** See Default, 4.

**BILL OF LADING.** See Common Carriers, 1, 3.

**BONDS.**

1. **SURETIES—ACTION ON PERFORMANCE BOND—DAMAGES—EVIDENCE—FINDINGS.**—In this action to recover a money judgment upon a performance bond executed by defendants, as principal and surety, in connection with a contract by the principal to construct certain ditches, pipes, etc., as part of an irrigation system belonging to plaintiff, the evidence was sufficient to support the finding of the trial court that by reason of the failure of the contractor to complete the work in accordance with the terms and specifications of his contract, plaintiff was damaged in the amount for which the bond was given. (Oakdale Irr. Dist. v. Beard, 66.)
2. **DEFECTS IN CONTRACT—VALIDITY OF BOND NOT AFFECTED.**—In an action against the principal and the surety on a bond given as security for the performance by the principal of certain work, it is no defense that there were certain defects in the steps leading up to the making of the original contract and that the law was not in all respects complied with. (Id.)
3. **NONCOMPLETION OF WORK—RECITALS IN BOND—EVIDENCE.**—Where, after the work was completed by the contractor, payment therefor by the irrigation district was made upon his giving a bond in which it was recited that "whereas of such portions of said contract as has been tested certain parts are unsatisfactory to the board of directors and the engineer of said district, because of the fact that small leaks have developed" and that the irrigation district is willing to pay the contractor if he executes a bond "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said con-

**BONDS (Continued).**

tract," such recitals are conclusive, or, at least, very strong, evidence that at the time the bond was executed the contractor had not constructed the work in accordance with the terms of the contract. (Id.)

See Insolvency, 8; Judgments, 11; Mechanics' Liens, 2-6; Street Law, 1-3, 5, 8.

**BOOKS.** See Accounts, 6, 7; Evidence, 2.

**BRIDGES.** See Negligence, 1, 2.

**BROKERS.**

**PROCURING CAUSE OF SALE—CONSUMMATION THROUGH ANOTHER.**—When an agent takes a prospective purchaser upon land which he has been authorized in writing by the owner to offer for sale and to sell, introduces such purchaser to the owner and succeeds in awakening his interest in the property, and the purchaser expresses a tentative or conditional purpose to buy the land, and a short time thereafter he does purchase it, the trial court is justified in concluding that such agent's efforts were the procuring cause of the sale, or at least that the sale "was made by, through, or upon information received through such agent"; notwithstanding the sale is consummated through another agent. (*Maloolf v. Davis*, 742.)

**BROKER'S COMMISSIONS.**

1. **CONTRACT OF EMPLOYMENT BY CORPORATION—PRIMA FACIE SHOWING.**—In an action against a corporation to recover a broker's commission, a document purporting on its face to have been signed by the president and the secretary of the corporation, and having attached thereto and impressed thereon the seal of the corporation, is entitled to admission as *prima facie* having been authorized and executed by the corporation. (*Arnold v. La Belle Oil Co.*, 290.)
2. **STATUTE OF FRAUDS—EMPLOYMENT OF AGENT—CONSTRUCTION OF CODE SECTION.**—Section 1624, subdivision 6, of the Civil Code does not require any formal contract but only that the fact of employment as agent or broker to sell real estate for compensation or a commission be expressed in writing, signed by the party to be charged, or by his agent. (Id.)
3. **PROCURING OF PURCHASER AT LESSER PRICE—RIGHT TO COMPENSATION.**—Where a broker procures a purchaser, not at the price specified in his contract of employment but at a lesser price, and the owner enters into an agreement of sale with such purchaser at such lesser price, under which agreement the latter enters into

**BROKER'S COMMISSIONS (Continued).**

possession, the broker is entitled to the compensation agreed upon, according to his contract of employment. (Id.)

4. **MODIFICATION OF PURCHASE AGREEMENT—RIGHTS OF BROKER NOT AFFECTED.**—The subsequent modification of such contract of purchase by mutual consent of the vendor and the purchaser would not affect the right of the broker to the compensation agreed upon in his contract of employment, and to which he was entitled when the vendor and the purchaser enter into the original contract of purchase. (Id.)

**BURGLARY.** See Criminal Law, 8, 9, 22, 29.

**CANALS.** See Easements, 1.

**CARE.** See Bailments, 1; Negligence, 8, 9, 30, 35, 36, 40.

**CAUSES OF ACTION.** See Actions, 1.

**CHECKS.**

**RECEIPT OF CHECK—PAYMENT—PRESUMPTION.**—While the mere receipt of a check by the creditor does not operate as payment, where the creditor acknowledges receipt of the check, does not deny that he cashed it, fails to return it or make any protest of non-payment to the debtor, and in no way questions the transaction, he will be presumed to have collected the money. (Bledsoe v. Stuckey, 95.)

See Banks and Banking, 1; Gifts, 1.

**CHOSE IN ACTION.** See Property, 2.

**CITIES.** See Municipal Corporations.

**CLAIM AND DELIVERY.**

1. **CONDITIONAL SALE OF AUTOMOBILE—OWNERSHIP—RIGHT OF POSSESSION—FINDINGS.**—In this action in claim and delivery to recover possession of an automobile sold by plaintiff to defendant under a contract of conditional sale, wherein the title to the car was expressly reserved in plaintiff until the automobile was completely paid for, while a finding that defendant was entitled to possession of the automobile was authorized, a finding that plaintiff was not the owner of the automobile was unsupported by the evidence. (Lee v. De La Motte, 23.)
2. **CLAIM OF RETURN OF PROPERTY—INSUFFICIENCY OF ANSWER.**—Where the answer, in an action in claim and delivery in which the property has been delivered to the plaintiff, does not claim a re-

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**CLAIM AND DELIVERY (Continued).**

turn of the property, such answer is insufficient to support a judgment for its return. (Id.)

3. **DELIVERY OF AUTOMOBILE TO PLAINTIFF FOLLOWING JUDGMENT—REVERSAL ON APPEAL—RIGHT TO RESTITUTION.**—In an action by a mortgagee against a repairman to recover possession of an automobile, the mere delivery of the automobile by the defendant to the plaintiff, for whom judgment was rendered, pending the determination of defendant's appeal, no stay bond being filed, will not deprive the defendant of the right to have a judgment of restitution of the property upon a retrial of the cause, following the reversal by the appellate court of the first judgment entered. (Mortgage Securities Co. v. Pfaffman, 383.)
4. **JUDGMENT FOR PLAINTIFF—DUTY OF PLAINTIFF TO DELIVER POSSESSION ON DEMAND.**—The trial court, in such action, having adjudged that plaintiff was entitled to the possession of the automobile, the law imposed the duty upon the defendant, where execution was not stayed, to deliver the machine to plaintiff upon its demand, even though execution was not issued upon the judgment. (Id.)
5. **PRIORITY OF LIEN OF REPAIRMENT—NONPAYMENT OF MORTGAGE DEBT—IMMATERIAL ISSUE.**—In an action by a mortgagee against a repairman to recover possession of an automobile, the trial court having determined, in accordance with a decision by the supreme court on an appeal from a prior judgment in the case, that the lien of the repairman is superior to the lien of the mortgagee, its failure to find on the issue as to the nonpayment of the mortgage debt is immaterial. (Id.)
6. **STATUTE OF LIMITATIONS—EVIDENCE—UNSUPPORTED FINDING.**—In this action to recover possession of certain described personal property or the value thereof, the evidence was insufficient to sustain the court's finding that the cause of action was not barred by the provisions of the third subdivision of section 338 of the Code of Civil Procedure. (Credit G. Co. v. Fidelity S. & M. Co., 438.)
7. **PLEADINGS—FINDINGS—UNWARRANTED AFFIRMATIVE RELIEF TO DEFENDANT.**—Where the answer filed by the defendant in an action to recover possession of certain personal property does not claim a return of the property, and there is nothing in the pleadings or findings to indicate that the property was delivered to the plaintiff, or was not all the time held in possession of the defendant, a judgment that defendant recover from plaintiff the said personal property, or, if delivery thereof cannot be had, then the defendant have judgment in a stated sum (found to be the value of the property, less a certain allowed credit), and for costs, cannot be sustained, in so far as it grants to the defendant affirmative relief, except as a judgment for costs. (Imperial Valley Auto Co. v. Toney, 541.)



**CLAIM AND DELIVERY (Continued).**

8. **PLEADING—POSSESSION—FINDINGS—ISSUES — APPEAL — PRESUMPTION.**—On an appeal on the judgment-roll alone from a judgment in favor of the plaintiff in an action to replevin an auto-truck, although the complaint failed to touch upon the subject of possession of the property by defendant at the commencement of the action, or the implication of such possession was very defectively conveyed, but such defect was not raised by demurrer, it will be presumed in favor of the judgment and findings of the trial court showing defendant's possession of the truck at the commencement of the action, that such fact was, at the trial, treated as a fact within the issues and properly to be determined by the court. (*Pioneer Truck Co. v. Hawley*, 594.)

See Damages, 1, 2.

**CLAIMS.** See Attachment, 1; Common Carriers, 2, 3; Estates of Deceased Persons, 1; Police Officers, 4; Street Law, 4, 5.

**COLLATERAL ATTACK.** See Supplemental Proceedings, 2.

**COMMON CARRIERS.**

1. **NATURE OF BILL OF LADING—ACTION FOR BREACH—STATUTE OF LIMITATIONS.**—A bill of lading is not only a receipt for the goods consigned to the carrier for shipment but also a contract between the carrier and the shipper as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified, and an action against the carrier for a breach thereof, if commenced within four years, is not barred by the statute of limitations. (*Pioneer Fruit Co. v. Southern Pac. Co.*, 44.)
2. **TIME FOR PRESENTATION OF CLAIM—COMPLIANCE WITH BILL OF LADING.**—A provision in a bill of lading requiring claims for damages for loss or injury to goods shipped to be made in writing to the carrier at the point of delivery or of origin within four months after the delivery of the property is complied with by the giving of written notice of the claim by the agent of the consignee to the general freight agent of the delivering carrier at the time of the arrival of the shipment at its destination. (*Id.*)
3. **ACTION FOR BREACH—APPEAL—INSUFFICIENT RECORD.**—Where the record on appeal from the judgment in favor of the plaintiff in an action against the carrier for breach of its contract for the transportation and delivery of goods does not contain a copy of the bill of lading involved, the appellate court cannot know there was any provision therein as to the time within which the plaintiff's claim for damages for the breach of its terms must have been presented. (*Id.*)

**COMMON CARRIERS (Continued).**

**4. NEGLIGENT TRANSPORTATION OF BANANAS—FAILURE TO KEEP AT PROPER TEMPERATURE—EVIDENCE—INFERENCES—FINDING.**—In this action to recover damages alleged to have been sustained by plaintiff on account of defendants' negligence in transporting a car of bananas, the testimony of the messenger who was in charge of the car that the same was kept at a proper temperature while en route, coupled with the testimony of others which tended to show that the damage resulted from leaving the car door open during the night after its arrival at the point of destination, was sufficient to justify the finding of the trial court to the effect that the deterioration of the fruit, which was delivered to the defendants at the point of shipment in good condition, was due to the failure of the defendants to keep the same under proper refrigeration, and such evidence was not overcome by the inferences sought to be drawn from a report as to the varying outside temperatures along the line of travel. (*Ferraris v. Southern Pac. Co.*, 560.)

See Agency, 1, 2, 4, 5.

**COMMUNITY PROPERTY.** See Husband and Wife, 9; Maintenance, 2; Quieting Title, 6.

**CONFESSION.** See Criminal Law, 8.

**CONFIDENTIAL RELATIONS.** See Husband and Wife, 5.

**CONSIDERATION.** See Husband and Wife, 9, 10; Leases, 6; Negotiable Instruments, 1; Promissory Notes, 1, 13; Quieting Title, 6.

**CONSIGNOR AND CONSIGNEE.** See Pledges, 2.

**CONSTITUTIONAL LAW.** See Judgments, 14; Medical Practice Act, 1; Nuisances, 2; Ordinances, 4; Poison Act, 2; Promissory Notes, 9; School Law, 2.

**CONSTRUCTION.** See Criminal Law, 18; Fire Insurance, 2; Libel, 13.

**CONTEMPT.**

**REFUSAL TO PRODUCE BOOK OR PAPER—ORDER PUNISHING—NECESSARY RECITALS.**—An order punishing a witness for contempt for refusing, in open court, to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order, and for this purpose must recite facts showing that the document contains evidence pertinent and material to the issue to be tried. (*Pyker v. Jennings*, 623.)

See Supplementary Proceedings, 1.

CONTINUANCES. See Default, 2; New Trial, 3.

CONTRACTS.

1. **AGREEMENT TO SUBMIT TO ARBITRATION—JURISDICTION OF COURT.**—An arbitration clause in a contract will not be held to oust the courts of jurisdiction where there are no express words in the contracts making submission to arbitration a condition precedent to the bringing of a suit and no language used therein from which such intent can be inferred. (*Oakdale Irr. Dist. v. Beard*, 66.)
2. **SALE OF BEANS—CONSTRUCTION OF TELEGRAMS—RIGHT OF INSPECTION.**—In this action to recover damages for the alleged breach of a contract in and by which it was claimed that defendant agreed to sell to plaintiff a specified quantity of re-cleaned pink beans at a given price, a fair construction of the telegrams passing between plaintiff and defendant showed that they met upon a definite proposition and agreement. The fact that to the telegram from plaintiff's bank guaranteeing payment of draft with bill of lading attached, as requested by defendant, there was added the words, "subject permission inspection on arrival," did not prevent a meeting of the minds of the parties, as the law would have added those words to the contract even if they had not been inserted in the telegram. (*Humphry v. Farmers U. & M. Co.*, 211.)
3. **TRANSMISSION OF REPLY—CONSUMMATION OF CONTRACT.**—After plaintiff's bank had telegraphed its guarantee of payment, as requested by defendant, although such telegram had not been delivered, and after all the terms and conditions imposed by defendant had been accepted, defendant could not prevent the consummation of the contract by telegraphing plaintiff that his wire was received too late and that the entire matter was canceled. (*Id.*)
4. **PLACE OF PAYMENT—CONSTRUCTION OF TELEGRAMS.**—The telegram from defendant to plaintiff instructing the latter to have his bank wire guarantee of payment of draft with bill of lading attached and the telegram from such bank in response to such demand worded, "We guarantee payment your draft, bill of lading attached," showed that the understanding of the parties was that the goods were to be paid for at the point of destination, and not at the point of shipment, notwithstanding the telegram from defendant to plaintiff quoted the price of such goods "F. O. B." the point of shipment. (*Id.*)
5. **BREACH—ACTION FOR DAMAGES—PRICE—EVIDENCE.**—Where, in such action for damages for breach of contract to sell certain beans, the only evidence before the court as to the amount the plaintiff would have had to pay for equivalent beans was the price at which equivalent beans could have been bought at the

**CONTRACTS (Continued).**

point of shipment, the trial court was justified in accepting that price as the price at which plaintiff could have bought equivalent beans in the market nearest the place of delivery. (Id.)

6. **SALE OF CROP TO BE GROWN.**—A valid contract may be made for the sale of a crop to be grown in the future by the vendor where such vendor possesses the land upon which the crop is to be grown. (*Hogue-Kellogg Co. v. Baker*, 247.)
7. **CONSTRUCTION OF—PASSING OF TITLE.**—A provision that such contract shall pass title and constitute an absolute sale, with a risk on the grower for loss or damage until delivery, will be construed to mean only that title should be deemed to pass whenever the produce becomes a growing crop. It is competent for the parties to so contract. (Id.)
8. **SECTION 1141, CIVIL CODE, APPLIED.**—Assuming that the provision that such contract should pass title is void, it will not vitiate the main contractual obligation imposed upon the seller, which is to grow and deliver the crop, but in that case section 1141 of the Civil Code, which declares when title is transferred by an executory agreement for the sale of personal property, is applicable. (Id.)
9. **LIABILITY OF BUYER FOR PURCHASE PRICE—MUTUALITY OF CONTRACT.**—Such a contract requiring the seller to grow and deliver a certain crop is not lacking in mutuality where its terms are sufficient to enable him, if he produces a crop and offers it to the buyer and the latter refuses to accept it, to enforce the term of the contract which provides for the payment of the purchase price agreed upon. (Id.)
10. **ACTION FOR BREACH—ALLEGATION OF DAMAGE—VALUE OF CROP.**—In an action by the purchaser against the seller for damages for breach by the latter of a contract to grow and deliver a certain crop of beans, an allegation in the complaint of the price at which the plaintiff "might have bought" beans in the market at the time delivery from defendant was due is insufficient as an allegation of damage, as it is not an allegation of the valuation of the beans to the plaintiff or the market value thereof. (Id.)
11. **PLEADING—DAMAGES—SUFFICIENCY OF COMPLAINT.**—In such an action, the plaintiff, after alleging the making of the contract, the terms thereof, and the breach committed by the defendant, is not required to plead the particulars as to why and how he has been damaged, but may allege generally that by reason of the failure and refusal of the defendant to grow and deliver the crop in question he had been damaged in a given sum. (Id.)
12. **DIVISIBILITY—INTENTION OF PARTIES—OBJECT OF AGREEMENT—DEFAULT IN PART.**—The divisibility of a contract does not alone depend upon the multiplicity or the separability of the items

CONTRACTS (Continued).

therein, but upon the intention of the parties and the object of the contract. If it is the intention of the parties to treat the contract as an entire contract, and it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed, it is not a divisible contract, and the contracting parties will not be allowed, under those circumstances, to perform part of the contract and default in its other parts without being held answerable for the performance of the entire contract. (*Stein v. Sunset Road Oil Co.*, 334.)

13. AGREEMENT TO SUPPLY OIL FOR CURRENT USE AND STORAGE—DIVISIBILITY OF—INTENTION OF PARTIES.—In this action involving the construction of a contract under which an oil company agreed to supply a railroad company with fuel oil for current use and for storage, considering the situation of the parties and the object of the original contract and of the supplemental agreement under which the railroad company made certain advances on account of the fuel oil supplied for storage that the oil company might develop its properties that oil both for current use and storage oil might be produced, it was plain that the intention of the parties was to treat the contract as a whole, and that they would not have entered into one part of the contract on the terms therein specified had it not contained the other part. (*Id.*)
14. ADVANCES ON ACCOUNT OF OIL TO BE SUPPLIED FOR FUTURE USE—DEFAULT BY OIL COMPANY—RIGHT OF RECOUPMENT AS AGAINST ASSIGNEE.—The railroad company, pursuant to such supplemental agreement, having made the advances to the oil company on account of the fuel oil to be supplied for storage, but the latter having defaulted in the performance of that part of its contract, the railroad company had the right to recoup itself, as against the claim of the assignee of the oil company for oil supplied for current use, to the extent of such advances, notwithstanding the default was not made until subsequent to the receipt by the railroad company of notice of the assignment. (*Id.*)
15. NOTICE TO ASSIGNEE OF SUPPLEMENTAL AGREEMENT AND ADVANCES THEREUNDER—ESTOPPEL OF RAILROAD COMPANY TO CLAIM RIGHT TO RECOUPMENT.—The railroad company was not estopped to claim the right to recoup itself because of the fact that, upon receiving notice of the assignment of the claim of the oil company, it did not notify the assignee that it had a claim, or intended to make a claim, against the oil company because of the advances made by it under the supplemental agreement on account of the oil to be supplied for storage, where the circumstances were such that it had a right to assume that such assignee was fully informed of the supplemental agreement under which such money was advanced and it had no knowledge or notice that such as-

## CONTRACTS (Continued).

- signee had advanced or intended to advance to the oil company any money on the shipments of oil for current use. (Id.)
16. **ESTOPPEL—KNOWLEDGE OF FACTS—BURDEN OF PROOF.**—Before such assignee could successfully urge such estoppel, the burden was on it to show that it was not only destitute of knowledge of the real facts, but that it was without convenient or ready means of acquiring such knowledge. (Id.)
17. **PURCHASE OF AUTOMOBILE—ACTION FOR RESCISSION—TIME OF DELIVERY—PAROL TESTIMONY.**—In an action to enforce rescission of a contract for the purchase of an automobile which does not fix the date of delivery, it merely being stated in the contract that delivery is to be made "on or about out of first shipment of this model," nothing therein being shown as to whether the shipment of automobiles had already been ordered or as to when such shipment would be made, it is proper for the court to receive testimony touching the representations and statements made by the vendors on the subject of delivery. (Boland v. Smith, 404.)
18. **STATUTE OF FRAUDS—ORAL PROMISE TO CONVEY PROPERTY.**—An oral promise to convey property upon demand is void under section 1624 of the Civil Code, in the absence of elements of fraudulent conduct taking the case outside of the requirements of said statute. (Schwarz v. Bohle, 445.)
19. **SALE OF POTATOES—ACTION FOR UNPAID BALANCE—EXECUTION OF NEW AGREEMENT—EVIDENCE—FINDING.**—In this action brought to recover the unpaid balance of money due for a crop of potatoes sold and delivered by plaintiff to defendant, the evidence was sufficient to support the finding of the trial court that, after the original contract in which defendant agreed to pay a given price per pound was entered into, plaintiff and defendant did not enter into a new agreement whereby the first contract was rescinded and a new agreement of sale made at a reduced price, and that defendant did not receive the potatoes pursuant to such a new agreement. (Stone v. Porter-Burnham Co., 448.)
20. **ADVANCEMENT OF MONEY TO PERFECT INTENTION—PARTIAL BREACH—RESCISSION—RESTORATION.**—Where defendant agreed to advance to plaintiff, an inventor, the moneys necessary to pay for time spent and materials used in the building of a new invention for automatically changing phonograph needles and for a patent thereon, in consideration of the transfer to defendant of a one-half interest in such patent, and there was a partial breach of such contract, by defendant entitling plaintiff to rescind the same, he may only do so upon returning to defendant everything of value received from defendant under the contract. (Vaughn v. Fey, 485.)

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CONTRACTS (Continued).

21. **PAYMENTS MADE TO OTHER THAN PLAINTIFF—ACCEPTANCE OF BENEFITS—OBLIGATION TO RETURN.**—The fact that a part of such money was not paid directly to plaintiff, but to the patent office for a patent and to vendors of materials for supplies to be used in completing the model, does not affect plaintiff's obligation to return the same to defendant, where such money was paid under the contract for the benefit of plaintiff and to enable him to perfect his invention, and he accepted the benefits thereof. (Id.)
22. **ACTION TO RECOVER ARCHITECT'S FEES—EVIDENCE—FINDING.**—In this action to recover fees alleged to be due from the defendant on a contract for professional services which were rendered by the plaintiff as an architect, notwithstanding the testimony given by the defendant and others tending to prove that the contract of employment was conditioned upon plaintiff's procuring a tenant for the contemplated building, acceptable to the defendant, there was sufficient evidence to support the court's finding of the existence of a contract free from such condition. (*Borgmeyer v. Solomon*, 620.)
23. **NATURE OF CONTRACT—INSUFFICIENT PLEADING—UNNECESSARY FINDING.**—In such an action, where affirmative matters stated in the answer are not sufficient to present the defense that there was a conditional contract, such matters being pleaded only as a part of the defense that there was no contract of employment whatever, a specific finding as to whether the contract was a conditional one is not necessary. (Id.)
24. **BAILMENTS—ENLARGEMENT OF BAILEE'S LIABILITY—AGREEMENT AND INTENTION OF PARTIES.**—A contract enlarging a bailee's liability must be specific and in clear and unambiguous language; and, while it will not be extended beyond the obvious scope of its terms, it must be given effect as showing the intention of the parties. (*Commercial A. S. Co. v. Fox*, 673.)
25. **LOAN OF GAS CYLINDERS—DESTRUCTION BY FIRE—LIABILITY FOR DAMAGE—AGREEMENT OF BAILEE.**—Where a contract, in the form of a letter from the seller of acetylene gas to the purchaser and the acceptance by the latter, contains a provision that the purchaser is "responsible for any damages" to any of the cylinders containing such gas while in the purchaser's possession, and such cylinders are almost totally destroyed by fire while in the latter's possession, he is liable in damages therefor, notwithstanding there was no negligence on his part. (Id.)
26. **RESPONSIBILITY FOR DAMAGES—CONSIDERATION.**—Where a seller of acetylene gas loans certain cylinders to a purchaser for a specified time without rent and the latter agrees to be responsible for any damage to the cylinders while they are in his possession, the bailment itself is a sufficient consideration for the obligation assumed by the purchaser. (Id.)

## CONTRACTS (Continued).

27. **AUTHORITY TO SELL PROPERTY—INCLUSION OF AUTOMOBILE—PAROL TESTIMONY.**—In this action for services rendered in procuring a purchaser of certain real and personal property pursuant to the terms of a written contract executed by the defendant, which sale was not consummated because of the refusal of defendant to transfer to the prospective purchaser an automobile owned by her, the trial court committed error in permitting the introduction of parol testimony that plaintiff was authorized to include such automobile in the sale of the property, the contract having described the property "as is completely furnished," excepting certain articles of personal property, but made no mention of the automobile. (*Wright-Callender-Andrews v. Eaton*, 685.)
28. **AGREEMENTS IN WRITING—PRESUMPTION—PAROL EVIDENCE INADMISSIBLE.**—Where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the whole agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evidence cannot be admitted for the purpose of adding other terms or items thereto. (*Id.*)
29. **SALE OF CROP OF ORANGES—DESTRUCTION BY FROST—LIABILITY OF BUYER.**—Where a contract for the sale of a crop of oranges then growing in a certain orchard states that the owner "has this day sold" the same, and provides that the buyer is to furnish all boxes to put the said fruit in and to pick the fruit free of all costs to the owner, the fruit to be of merchantable quality and picked at the option of the buyer, provided the same is removed on or before a specified date, the buyer is obligated to take the fruit which is mature and ready for the market on or before that date, and at such reasonable time as should be necessary to insure their good condition, and where the buyer does not do so, and the fruit is destroyed by frost, the buyer is liable to the owner for the purchase price thereof. (*Miller v. Hunt, Hatch & Co.*, 768.)
30. **ACTION TO RECOVER UNPAID BALANCE—CONDITION OF FRUIT—EVIDENCE—FINDINGS—APPEAL.**—In this action to recover an unpaid balance alleged to be due on the sale by plaintiff to defendant of a crop of oranges, a part of which had been destroyed by frost, the evidence was sufficient to support the findings of the trial court that the portion of the fruit which was marketable on a specified date was easily and readily separable from that which had been frozen, and that the fruit for which compensation was allowed was merchantable during a certain specified period; and, though there was testimony to the contrary, such findings were conclusive on the appellate court. (*Id.*)

See Appeal, 4; Automobile Insurance, 5, 8; Bonds, 1-3; Broker's Commissions, 1-4; Common Carriers, 1-3; Corporations, 9;



**CONTRACTS (Continued).**

Deposit, 1; Divorce, 2, 7-10, 13, 20; Evidence, 8; Guaranty, 1, 2; Husband and Wife, 1, 4, 9; Judgments, 20; Leases, 2-4; Negligence, 28; Pledges, 3; Quieting Title, 6; Street Law, 6; Vendor and Vendee, 1, 6-8, 10, 11; Workmen's Compensation Act, 1, 2.

**CONVERSION.**

1. **PLEADING—AMENDMENT AT TRIAL—ADDITION OF PARTY PLAINTIFF—ABSENCE OF PREJUDICE.**—In an action to recover the value of certain goods, wares, and merchandise alleged to have been converted by the defendant to his own use, the defendant is not prejudiced by the action of the court in granting plaintiff leave at the trial to amend his complaint by adding another party plaintiff, where the defendant does not object to the amendment at the time and does not accept the court's offer to allow further time to answer, and, at his suggestion, it is stipulated by plaintiffs that if his defense is good against either one of the plaintiffs, it is good against both. (*Bhumgara v. Gasvini*, 515.)
2. **RECEIPT AND CONVERSION OF PROPERTY—EVIDENCE—FINDINGS.**—In this action to recover the value of certain goods, wares, and merchandise alleged to have been converted by the defendant to his own use, although some of the evidence was circumstantial, there was sufficient evidence to sustain the findings of the trial court as to the receipt of plaintiffs' goods by defendant and their alleged conversion. (*Id.*)
3. **CONVERSION OF AUTOMOBILE—ALLEGATIONS ON INFORMATION AND BELIEF—SUFFICIENCY OF.**—An allegation, on information and belief, that the conditional vendee of an autotruck, without the knowledge and consent of the vendor, removed the truck from the county, and from the state, and ever since has and does now conceal the same with the intent to injure and defraud the vendor, and that said vendee embezzled said truck and wrongfully converted the same to his own use, constitutes a sufficient allegation of conversion, as against a general demurrer. (*Buxton v. International Indemnity Co.*, 583.)

See Arrest, 1, 2; Bailments, 2; Sales, 2.

**CONVEYANCES.** See Deeds; Deeds of Trust.

**CORPORATIONS.**

1. **SALE OF STOCK ON EXECUTION—TITLE OF PURCHASER—RULE INAPPLICABLE TO MUTUAL WATER COMPANIES.**—The rule that where one at a sale under execution, in the absence of facts shown which charge him with notice that another has an interest therein as owner or pledgee, buys shares of corporate stock standing upon the books of a corporation in the name of

## CORPORATIONS (Continued).

the judgment debtor, he acquires absolute title thereto, is inapplicable in the case of purchase of shares of stock in a mutual water company created not for profit and to pay dividends to the stockholders, but solely for the convenient and more economical management of a common source of water in the distribution of and from which, according to their respective rights, the owners of these several tracts of land are entitled to a supply of water for use thereon. (*Marble & Tile Co. v. Dunsmore etc. Co.*, 72.)

2. **EXCHANGE OF WATER RIGHT FOR STOCK—SALE OF LAND ON FORECLOSURE—PRIORITY OF TITLE TO WATER RIGHT AS AGAINST EXECUTION PURCHASER OF STOCK.**—Where the owner of a water right as an appurtenance to certain land conveys such water right to a mutual water company created not for profit but solely for the convenient and more economical management of a common source of water and receives in exchange therefor shares of stock in said company in proportion to his previous rights in the water, such water right remains as an appurtenance to the land and passes to the purchaser of the land on the foreclosure of a mortgage duly recorded wherein the owner of the land mortgaged the same, "together with all water rights, pipe-lines, ditches and appurtenances thereunto belonging," as against a subsequent purchaser at execution sale of the stock which still stood on the books of the company in the name of the former owner. (Id.)
3. **ACTION TO ESTABLISH OWNERSHIP OF STOCK—COMPLIANCE WITH SECTION 324, CIVIL CODE—APPEAL ON JUDGMENT-ROLL—PRESUMPTION.**—On an appeal on the judgment-roll alone, in an action by the execution purchaser of shares of stock in a mutual water company against the purchaser on foreclosure of a mortgage on the land of the execution debtor to obtain a decree adjudging it to be the owner of said stock and for an order requiring the water company to issue to it a certificate for the same, it will be presumed, in support of the judgment and finding of the trial court that such stock was appurtenant to the land and passed with the deed thereto, that the water company complied with the provisions of section 324 of the Civil Code making such stock appurtenant to and transferable with the land. (Id.)
4. **ACTION TO CANCEL VOID ISSUE OF STOCK—PLEADING—PARTIES—TRANSFEREE WITH NOTICE.**—In an action by a corporation to cancel an issue of certain shares of its treasury stock which had been issued in direct contravention of a permit that had been granted by the commissioner of corporations, an individual to whom a part of such stock was issued is neither a necessary nor a proper party defendant where, prior to the commencement of such action, such stock was transferred to another who took with full knowledge of all the facts affecting the validity of its issue; and a motion for a nonsuit as to him should be granted. (*American Bond etc. Co. v. Lindsay*, 131.)

## CORPORATIONS (Continued).

5. **EXECUTION BY SECRETARY OF CORPORATION—COMPLIANCE WITH BY TEMPORARY APPOINTEE.**—Where a given instrument is required to be executed by the secretary of a corporation, execution thereof by a person appointed by the directors to act in the place of the regularly elected, qualified, or acting secretary is sufficient. (*Arnold v. La Belle Oil Co.*, 290.)
6. **STOCKHOLDER'S LIABILITY—ACTION ON ORIGINAL OBLIGATION—RENEWAL NOTES—EFFECT OF.**—An action against the stockholders of a corporation to recover on their stockholder's liability is properly brought upon the original obligation of the corporation, notwithstanding the promissory notes evidencing such liability have been canceled and renewal notes issued, there having been no express agreement that the renewal notes should constitute payment and such notes not having been in fact paid. (*Seaboard Nat. Bank v. Belden*, 558.)
7. **INDORSEMENT OF NOTES AFTER MATURITY—LIABILITY OF STOCKHOLDERS.**—The rights and liabilities of a stockholder of a corporation are not affected by the fact that certain promissory notes executed to the corporation are not indorsed by it over to and sold to another until after their maturity. (*Id.*)
8. **NATURE OF STOCKHOLDER'S LIABILITY—EFFECT OF GUARANTY.**—The liability of the stockholders of a corporation is direct and primary, arising coincidentally with the debt of the corporation, and is not changed or affected by the existence of a guaranty. (*Id.*)
9. **FIXING OF SALARIES—NONCOMPLIANCE WITH BY-LAWS—VALIDITY OF AGREEMENT BETWEEN OWNERS.**—Where two persons who own and control a corporation to all substantial effect agree upon the salaries to be paid to each of them, such agreement is valid and binding, notwithstanding the by-laws of the corporation declare that the salaries of the officers and employees should be fixed by the board of directors. (*Hyman v. Karl Stern Co.*, 605.)
10. **BREACH OF CONTRACT—STOCKHOLDER'S LIABILITY—STATUTE OF LIMITATIONS.**—The statute of limitations begins to run in favor of the stockholder of a corporation on his stockholder's liability for a breach of contract by the corporation from the date of the contract and not from the time of its breach. (*Pidgeon v. San Diego C. Brewing Co.*, 676.)
11. **SALE OF STOCK—DUTY OF SECRETARY TO DISCLOSE PRICE OFFERED—PARTICIPATION BY OTHER STOCKHOLDERS IN BONUS RECEIVED.**—One who is a stockholder and the secretary of a corporation is under no legal obligation to disclose to the other stockholders that he has received an offer of a given amount per share for his stock in the corporation if such other stockholders will sell at a lesser amount per share to the extent that the purchaser

**CORPORATIONS (Continued).**

may secure a given number of shares; and if such other stockholders uninfluenced by the secretary, are willing and agree to and do sell at the lower price, they have no claim upon the additional price or bonus received by the secretary. (*McCord v. Martin*, 717.)

12. **POOLING OF STOCK—JOINT ADVENTURE NOT CREATED.**—A joint adventure does not exist where property is pooled by the several owners to be sold at a particular price, and each contributor is to receive the proceeds of the property contributed by him. (*Id.*) See *Broker's Commissions*, 1; *Supplementary Proceedings*, 2.

**COSTS.** See *Appeal*, 18; *Promissory Notes*, 16; *Street Law*, 2.

**COURTS.** See *Police Courts*.

**CRIMINAL LAW.**

1. **MURDER OF ARRESTING OFFICER—CONTEMPORANEOUS ATTEMPT ON LIVES OF OTHERS—RES GESTAE—EVIDENCE.**—In this prosecution for the murder of a special deputy sheriff, who was shot and killed by the defendant after he had taken the latter into custody for committing a breach of the peace, the fact that the defendant, without a moment's hesitation or delay, rushed from the scene of the first shooting, in an attempt upon the lives of members of the family in whose presence he had committed the breach of the peace for which he was taken into custody, was competent evidence tending to show that the motive which impelled him in both instances was anger and resentment growing out of the previous quarrel and altercation in which they had all participated. (*People v. Gilman*, 118.)
2. **RESISTANCE TO UNLAWFUL ARREST—HOMICIDE—DEGREE OF CRIME.** To admit the application of the doctrine that where in resistance of an illegal arrest the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter, there must be evidence not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant. (*Id.*)
3. **VERBAL NOTICE OF ARREST FOR MISDEMEANOR—KILLING OF OFFICER.**—A person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor cannot respond by shooting to death the officer and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint. (*Id.*)
4. **SUBMISSION TO ARREST—SUBSEQUENT HOMICIDE—DEGREE OF CRIME—INSTRUCTIONS.**—The defendant having submitted to the arrest and thereafter, while out of the physical control of the

**CRIMINAL LAW (Continued).**

officer, having shot and killed the latter, the trial court properly refused an instruction in behalf of the defendant to the effect that where the evidence shows a homicide is committed in resisting an unlawful arrest, the ground of conviction is limited to manslaughter. (Id.)

5. **FALSE PRETENSES—REPRESENTATIONS AS TO AMOUNT OF MONEY ON DEPOSIT—RELIANCE UPON.**—Where a purchaser obtains the property from the sellers upon the false representation that he has a given sum of money on deposit in a certain bank and his promise that by a certain day he will deposit such further sums as are necessary to meet the check which he then offers to them, and which they accept in payment and part with title to their property in reliance upon his representation as to the amount of money he then has on deposit, he is guilty of the crime of obtaining property by false representations. (In re James, 205.)
6. **PRELIMINARY HEARING—REJECTION OF TESTIMONY—PROVINCE OF COMMITTING MAGISTRATE.**—On a preliminary hearing, the committing magistrate is clothed with authority to reject the testimony of the defendant and to believe that of the other witnesses, and he is not required to confine himself to the doctrine of reasonable doubt. It is sufficient if there exists sufficient cause to believe that the defendant is guilty. (Id.)
7. **HOLDING TO ANSWER—PROOF REQUIRED.**—On a preliminary hearing of a defendant charged with obtaining property by false pretenses, it is not necessary, in order to hold the defendant to answer, that the committing magistrate shall be satisfied as to any fact beyond a reasonable doubt. (Id.)
8. **BURGLARY—PROOF OF CORPUS DELICTI—ADMISSION OF CONFESSION.** In this prosecution for the crime of burglary, the testimony of the caretaker of the premises that the crime was committed between the hours of 8 o'clock P. M. of a certain day and shortly before 8 o'clock A. M. of the next day, at which latter time he discovered the facts and, following tracks from the building, located in a hedge of trees property similar to that which was stolen, the testimony of the sheriff that he stationed himself near the cached property found by the caretaker and arrested the defendant when he appeared there the following night with a sack under his coat, and the testimony of another witness that between the hours of 10 and 11 o'clock on the night the crime was committed the defendant, accompanied by another party, came to his house and left certain property, which property was identified as being similar to that which was stolen, and the inferences fairly deducible therefrom, were sufficient to establish beyond a reasonable doubt that the offense was committed in the night-time, and, therefore, the court did not err in admitting evidence of the defendant's confession. (People v. Cota, 224.)

## CRIMINAL LAW (Continued).

9. **BURGLARY DEFINED—INSTRUCTIONS—EVIDENCE.**—In such prosecution the defendant was not prejudiced by an instruction, in the language of section 459 of the Penal Code, that "Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary," where no evidence other than that pertaining to the offense charged in the information was offered. (Id.)
10. **VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR—VIOLATION OF OATH—PERJURY.**—The oath of a prospective juror on his *voir dire* examination binds him, under the pains and penalties of perjury, to truthfully answer the questions that may be propounded to him by either court or counsel. (In re De Martin, 228.)
11. **VARYING TERMS OF JUDGMENT—POWER OF JUSTICE OF PEACE.**—A justice of the peace has no power, after the commencement of the execution of a judgment giving the defendant the option of avoiding imprisonment by the payment of a fine, to enter an order purporting to withdraw the option and directing the imprisonment of the defendant. (In re Gottschalk, 260.)
12. **APPEAL TO SUPERIOR COURT—DENIAL OF NEW TRIAL—STATEMENT OF CASE—JUDGMENT-ROLL—CONSIDERATION OF BY APPELLATE COURT UPON HABEAS CORPUS.**—The statement on appeal from a justice's or police court to the superior court in criminal cases the triable jurisdiction of which is in the first named courts constitutes a part of the judgment-roll or judgment record of the case in the superior court, where a new trial is denied; and, upon *habeas corpus*, in a criminal case so appealed to the superior court, where a new trial has been denied, it is competent and proper for the district court of appeal to look into the facts as they are presented in the statement on appeal to the superior court for the purpose of determining the question whether the justice's or police court exceeded its jurisdiction in the pronouncement of judgment of imprisonment. (Concurring opinion.) (Id.)
13. **ASSAULT WITH DEADLY WEAPON—APPEAL—AFFIRMANCE OF JUDGMENT.**—Where a defendant charged with the crime of assault with a deadly weapon with intent to commit murder is found guilty of assault with a deadly weapon and, on appeal, no argument is made in his behalf and no reason appears why the verdict should be disturbed, the judgment will be affirmed. (People v. Won Lee Wing, 326.)
14. **REASONABLE DOUBT—PROPER INSTRUCTION.**—An instruction that the term "reasonable doubt" as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case, and does not mean a doubt which may arise from some whim or vagary or from any groundless surmise or guess, is not erroneous. (People v. Wah Hing, 327.)

**CRIMINAL LAW (Continued).**

15. **MAYHEM — PREMEDITATED INTENT—EVIDENCE.**—In a prosecution for the crime of mayhem, it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime in order to sustain the charge, notwithstanding the word "maliciously" as used in section 203 of the Penal Code, in which that crime is defined, might imply otherwise. (*People v. Nunes*, 346.)
16. **UNLAWFUL STRIKING OF ANOTHER — RESULTANT LOSS OR DISFIGUREMENT.**—If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem. (*Id.*)
17. **DISFIGUREMENT OF EYE—EVIDENCE—FINDING.**—While under the statute the mere disfigurement of an eye would not amount to mayhem unless such disfigurement resulted in rendering the eye useless, in this prosecution the jury were warranted in finding, as their verdict implies they did find, that the defendant by the blow he delivered in and upon the face of the prosecuting witness "put out" the eye of the latter. (*Id.*)
18. **"PUT OUT THE EYE"—MEANING OF EXPRESSION.**—The expression or phrase "put out the eye," contained in section 203 of the Penal Code, means that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life. (*Id.*)
19. **EFFECT OF TESTIMONY GIVEN ON CROSS-EXAMINATION—PROVINCE OF JURY.**—In a prosecution for the crime of mayhem, if the direct testimony of the doctor who treated the prosecuting witness after the injury was inflicted upon the latter's eye is sufficient to sustain a verdict of guilty, but there are statements brought out on his cross-examination which are calculated to weaken his direct testimony in its tendency to show that the eye of the prosecuting witness was put out, it is for the jury to consider and determine what weight they should give his direct testimony when considered by the light of statements made on his cross-examination. (*Id.*)
20. **BURDEN OF PROOF—SUFFICIENCY OF INSTRUCTIONS.**—In a prosecution for the crime of mayhem, it is not error to refuse to read to the jury a requested instruction that they must find from the evidence that the defendant put out the eye of the complaining witness or they must acquit him, where the court, after stating to the jury in detail the contents of the information and reading to them section 203 of the Penal Code, upon which the information is based, tells them that, to justify a verdict of guilty, it rested upon the prosecution to prove beyond all reasonable doubt that "said defendant is guilty of the crime charged against him in the information." (*Id.*)

## CRIMINAL LAW (Continued).

21. **VIOLATION OF PAROLE—FORFEITURE OF CREDITS—POWERS OF PRISON DIRECTORS.**—Where a prisoner, while on parole, commits a second crime, the state board of prison directors has the power to forfeit not only his credits for good conduct which have already been earned on his first sentence but also such credits as might thereafter be earned by him on said sentence. (*In re Sanders*, 368.)
22. **BURGLARY—POSSESSION AND SALE OF STOLEN PROPERTY—EVIDENCE OF GUILT.**—Although the mere possession, by a defendant charged with the commission of the crime of burglary, of the stolen property after the time of the burglary may not be sufficient to warrant his conviction, such possession, taken together with his sale of the property under a false name and for a grossly inadequate price, in the absence of any explanation, are circumstances sufficient to sustain a verdict of conviction. (*People v. Majors*, 374.)
23. **USE OF MEMORANDA TO REFRESH MEMORY—CONVERSATIONS WITH THIRD PERSON IN DEFENDANT'S PRESENCE—ADMISSIBLE EVIDENCE.** In this prosecution of a defendant charged with the commission of the crime of burglary, the court did not err in permitting a witness for the prosecution, to whom the defendant had sold a part of the stolen goods, to refresh his memory as to dates and other details from a memorandum made by him at or about the time when the transaction occurred, or in permitting such witness to testify as to conversations and transactions between him and a third person, in the presence of the defendant, relating to the purchase by him from such third person of certain articles, some of which were a part of the loot of the burglary for the commission of which defendant was on trial. (*Id.*)
24. **RAPE—FABRICATION OF DEFENSE BY CODEFENDANTS—EVIDENCE.**—In a prosecution of a defendant charged jointly with another with the crime of rape, evidence of a conversation between the two defendants while they were confined in jail before the trial, which was indicative of a purpose on the part of both defendants to fabricate a defense to the charge, is properly submitted to the jurors for their consideration. (*People v. White*, 400.)
25. **AMENDMENT OF INFORMATION—CHANGE OF NAME OF PROSECUTRIX—LACK OF PREJUDICE—WAIVER OF OBJECTION.**—A defendant convicted of the crime of rape may not, for the first time, on appeal, raise the objection that he was prejudiced by the action of the trial court in permitting the district attorney, after the jury was impaneled, to amend the information on its face by correcting the name of the prosecutrix, the cause having thereafter proceeded to trial without any objection or suggestion that a different offense had been charged by changing the name of the prosecutrix. (*Id.*)



## CRIMINAL LAW (Continued).

26. **FAILURE OF INFORMATION TO CHARGE PUBLIC OFFENSE—MOTION IN ARREST OF JUDGMENT.**—The objection that an information does not state facts sufficient to constitute a public offense is not waived by a failure to demur, but may be raised by a motion in arrest of judgment. (*People v. Bliss*, 503.)
27. **OBTAINING MONEY UNDER FALSE PRETENSES—INDUCEMENT TO PART WITH PROPERTY.**—In charging the crime of obtaining money under false pretenses, the false pretenses must be a material element in inducing the prosecuting witness to part with his money or property. (*Id.*)
28. **RECEIPT OF CONSIDERATION PROMISED—PRESUMPTION—OTHER REPRESENTATIONS IMMATERIAL.**—Where an information charging defendant with obtaining money under false pretenses fails to allege that the prosecuting witness did not receive from defendant everything that the latter agreed to give in consideration for the money of the former, there can be no presumption that he did not receive these things, and the information is insufficient to charge a public offense on the part of defendant, notwithstanding it charges the latter with knowingly making false and untrue representations as to numerous other matters. (*Id.*)
29. **BURGLARY—EVIDENCE—VERDICT—INSTRUCTIONS—LACK OF PREJUDICE.**—In this prosecution of certain defendants charged, by an information, with having entered a store with intent to commit the crime of larceny, the evidence was sufficient to justify the verdict of guilty, the law was correctly stated to the jury, and no error prejudicial to the defendants was committed. (*People v. Riccomini*, 749.)

See Leases. 2; Ordinances, 3, 4.

**CROPS.** See Contracts, 6, 9, 29, 30; Deposit 1; Negligence 3.

**CUSTOM.** See Negligence, 40, 41.

## DAMAGES.

1. **CLAIM AND DELIVERY—DETENTION OF AUTOMOBILE—EXCESSIVE.**—Where the judgment in an action in claim and delivery to recover possession of an automobile used for pleasure purposes and damages for its detention, awards plaintiff the car, together with a sum more than half the market value thereof at the time it was taken for its depreciation during its detention, and a sum of over three times such market value for damages from being deprived of its use for about twenty months, such damages are excessive. (*Mutch v. Long Beach Imp. Co.*, 267.)
2. **MEASURE OF DAMAGES.**—While the amount to be allowed the plaintiff in such an action is to be determined according to the market value of the use of the property, it is the net usable value

**DAMAGES (Continued).**

less the expense of keeping up the property which may be recovered; and in determining the value of the use of the property, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself. (Id.)

3. **SPECIAL DAMAGE—FAILURE TO PLEAD—EVIDENCE INADMISSIBLE.**—Where special damage is not specially pleaded, the admission of evidence as to such damage, over defendants' objection, constitutes prejudicial error where it cannot be ascertained whether any such damages were allowed. (*Mills v. Conservatory of Music*, 300.)

See Animals, 1; Appeal, 4; Bailments, 2; Bonds, 1; Common Carriers, 4; Contracts, 10, 11; Landlord and Tenant, 1; Leases, 1; Libel, 11, 17; Negligence, 20, 23, 32, 33; Slander, 1; Trade Names, 3.

**DEEDS.****GRANT OF LIFE ESTATE—PRESENT CONVEYANCE OF REMAINDER.**

Where a deed to real property, after conveying to a given grantee a life estate therein, provides that, in the event of the death of said grantee, the property should "revert" to a daughter of the grantor, and to her heirs and assigns, and, in the event of the death of the daughter, before the death of said grantee, the property should "revert" to the heirs of said grantee, and in the *habendum* clause there is an expression indicating the intent of the grantor to make a present disposition of the reversion in said property, such deed is operative as a present conveyance of the remainder after the termination of the life estate in the grantee. (*Hughes v. Scott*, 264.)

See Execution Sales, 1, 2; Judgments, 2; Quieting Title, 7.

**DEEDS OF TRUST.** See Guaranty, 4.**DEFAULT.**

1. **NOTICE OF MOTION TO SET ASIDE—DAY OF HEARING—MISSTATEMENT.**—Where a notice of motion to set aside a default definitely designates the day of the month and year on which the motion will be made, a misstatement of the particular day of the week on which it will be made should be disregarded. (*Dunton v. Tanigoshi*, 231.)
2. **POSTPONEMENT OF HEARING—DUTY OF OPPOSITE PARTY.**—A notice that such a motion will be heard at a given hour of the day is sufficient to bring the opposite party into court at that time, and if there is any postponement of the hearing under rule of court, he is bound to ascertain that fact. (Id.)
3. **MOTION TO SET ASIDE—FAILURE TO ACCOMPANY WITH COPY OF ANSWER.**—Where the notice of motion to vacate and set aside

**DEFAULT (Continued.)**

the default of a defendant and the judgment entered thereon against said defendant is not accompanied by the answer, or other pleading proposed to be filed therein, as provided in section 473 of the Code of Civil Procedure, and no answer, or other pleading, is served upon the plaintiff or offered to the clerk for filing, the motion should be denied. (*Bailiff v. Hildebrandt*, 564.)

**4. APPEAL — BILL OF EXCEPTIONS — PLEADINGS — PRESUMPTION. —**

Where the bill of exceptions on appeal from an order granting a motion to set aside the default of a defendant and the judgment entered thereon does not show that an answer was served upon the plaintiff or offered to the clerk for filing, and the certificate of the judge states that it "contains the statement of all papers and evidence used in the above-entitled matter," and the stipulation of the attorneys is "that the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced and of all of the proceedings had upon the hearing of the above-entitled motion," it cannot be presumed, in favor of the order of the trial court, that an answer was served or filed. (*Id.*)

See *Contracts*, 14; *Vendor and Vendee*, 8, 10.

**DEFENSE.** See *Libel*, 1, 2, 6; *Negotiable Instruments*, 2, 3.

**DELIVERY.** See *Claim and Delivery*, 3, 4; *Contracts*, 17; *Gifts*, 2; *Sales*, 2.

**DEMANDS.** See *Police Officers*, 4; *Promissory Notes*, 9, 10.

**DEMURRERS.** See *Divorce*, 5; *Leases*, 5.

**DEPOSIT.**

**ADVANCEMENT ON PURCHASE PRICE OF CROP—ACCEPTANCE BY MORTGAGEE—LIABILITY FOR REPAYMENT OF EXCESS.**—Where an advancement on the purchase price of a growing crop is paid to the holder of a mortgage on the crop with the direction that the money be applied to the purchase of said crop, and the mortgagee acknowledged receipt of the money for that purpose, such mortgagee becomes a voluntary depository, within the meaning of section 1814 of the Civil Code, of the excess of the amount thus advanced over the amount needed for the purchase of the crop and is under a duty to return such residue to the depositor. (*Ennis-Brown Co. v. Richdale L. Co.*, 508.)

**DESCRIPTION.** See *Quieting Title*, 4.

**DISBARMENT.** See *Attorney at Law*, 3-5.

**DISCLAIMER.** See *Quieting Title*, 6.

**DISCRETION.** See Appeal, 3; Pleading, 1; Promissory Notes, 16.

**DISMISSAL.** See Appeal, 5, 15; Insolvency, 5; Judgments, 22, 25, 27-29.

**DIVORCE.**

1. **CROSS-COMPLAINT—GROUNDS—INSUFFICIENT PLEADING.**—Where the cross-complaint, in an action for divorce on the grounds of cruelty and desertion, details the facts relating to the separation of plaintiff and defendant, but it affirmatively appears therefrom that a cause of action for divorce on the ground of desertion or willful neglect had not accrued, either at the time of the filing of plaintiff's complaint or of defendant's cross-complaint, and there is no allegation that such acts resulted either in bodily harm or injury to the health of defendant, or a reasonable fear of one or the other, such cross-complaint does not state facts sufficient to constitute a cause of action for divorce, and a judgment for divorce in favor of the defendant is erroneous. (*Zartarian v. Zartarian*, 90.)
2. **ANTICIPATION OF—AGREEMENT TO PAY COUNSEL FEES—VALIDITY OF.**—An agreement, in advance and in anticipation of a divorce action being brought, to pay counsel fees and costs, is void as *contra bonos mores*. (*McCahan v. McCahan*, 173.)
3. **SEPARATION CONTRACT—POWER OF COURT TO DISREGARD.**—In an action for divorce the trial court is not bound by a provision in a contract of separation entered into between the parties wherein it is agreed that, in the event of such an action being instituted, a certain sum shall be awarded to the wife in full settlement of all her claims for counsel fees and costs, but, during the pendency of the action, either in the trial court or on appeal, the trial court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the same. (*Id.*)
4. **EXTREME CRUELTY—PLEADING.**—The plaintiff is not required to adopt the exact language of section 94 of the Civil Code in pleading a cause of action for divorce on the ground of extreme cruelty, but it is sufficient if, by appropriate averments, the proper qualification appears. (*McCahan v. McCahan*, 176.)
5. **ABSENCE OF ALLEGATION OF WRONGFUL CONDUCT—SPECIAL DEMURDER.**—Where in an action for divorce on the ground of extreme cruelty the course of conduct of the defendant is set forth in detail and it is alleged "all of which caused plaintiff great shame and humiliation, and inflicted upon him grievous mental suffering," but it is claimed that the complaint is insufficient by reason of the failure to state that the grievous mental suffering was "wrongfully" inflicted, such alleged defect can be reached

**DIVORCE (Continued).**

by special demurrer, and if not so attacked, it must be held to be sufficient. (Id.)

6. **GRIEVOUS MENTAL SUFFERING—QUESTION OF FACT—APPEAL.**—Whether in any case the course of conduct complained of constitutes "grievous mental suffering" is a question of fact, the determination of which in the first instance is committed to the judge who tries the action, and his finding that particular acts constitute grievous mental suffering will not be disturbed unless the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion. (Id.)
7. **SEPARATION AGREEMENT—UNDUE INFLUENCE—FINDING—EVIDENCE.** In this action for divorce on the ground of extreme cruelty, in which the defendant sought at the trial to avoid the legal effect of a separation agreement, entered into between herself and plaintiff, upon the ground that it was procured by undue influence, the evidence failed to disclose that the defendant was in any way coerced or induced by any means against her will to enter into the agreement. (Id.)
8. **AGREEMENT FACILITATING MARRIAGE DISSOLUTION—VALIDITY OF.**—An agreement entered into between a husband and wife with the object of dissolving the marriage contract, or facilitating that result, is void. (Id.)
9. **VOID PROVISION FOR ATTORNEY FEE—VALID PROVISIONS NOT AFFECTED.**—Although that portion of a separation agreement providing for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute a divorce action against the other, is void, such provision will not invalidate the other provisions of the agreement, which are disconnected and separable therefrom and are otherwise valid. (Id.)
10. **SEPARATION AGREEMENT—CONSIDERATION OF BY TRIAL COURT—CONSTRUCTION OF DECREE.**—The trial court, having jurisdiction of the divorce action, has jurisdiction to consider the separation agreement entered into between the parties, and to affirm it, or to disregard it if it is found to be void; and if the court in its decree makes no division of the property of the parties, or provision for the support of the wife, but does recognize and expressly reserve to her the power to assert such rights and benefits as might accrue to her under the previously executed separation agreement, such action on its part will be construed to be a ratification of the agreement to that extent. (Id.)
11. **VALIDITY OF AGREEMENT—REFUSAL TO SET ASIDE.**—The trial court, having found that the separation agreement was fairly made, and not obtained by coercion, intimidation, or undue influence, was correct in refusing to vacate and set it aside. (Id.)

## DIVORCE (Continued).

12. **INTERLOCUTORY DECREE—STATUS OF PARTIES.**—Under the provisions of section 132 of the Civil Code, the marital status of the parties is not affected by the interlocutory decree of divorce, further than that it establishes conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the right to a divorce upon the expiration of the statutory period of one year, which must elapse between the entry of the interlocutory decree and the final judgment dissolving the marriage. (Gould v. Superior Court, 197.)
13. **SETTLEMENT OF PROPERTY RIGHTS.**—Husband and wife may agree in regard to their real property rights, and may change the character of community property to separate property; and a court has power to do so in an action between them where such disposition is essential to a proper determination of their relative rights. (Id.)
14. **FINALITY OF INTERLOCUTORY DECREE.**—The statutory interlocutory decree in divorce suits in this state is final, except as against such attack as is authorized by statute. (Id.)
15. **EFFECT OF INTERLOCUTORY DECREE ON RIGHTS OF PARTIES.**—An interlocutory decree of divorce so far as it determines the rights of the parties is a contract between them, temporary and provisional in its nature, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being at least, restored. (Id.)
16. **INTERLOCUTORY DECREE—DEATH OF SPOUSE—TERMINATION OF MARITAL STATUS.**—The death of either of the spouses after the entry of an interlocutory decree of divorce terminates the marital relationship, the entry of a final decree thereafter having no effect upon the personal status of the surviving spouse. (Id.)
17. **DEATH OF HUSBAND—RIGHTS OF WIFE—SUCCESSION.**—Upon the death of the husband the rights of the wife under the laws of succession, if he died intestate, are fixed, unless those rights have theretofore been changed by contract with the husband. (Id.)
18. **INTERLOCUTORY DECREE—WHEN FINAL.**—Where no appeal is taken from an interlocutory decree of divorce and it is not set aside under section 473 of the Code of Civil Procedure, it becomes final and conclusive at the expiration of six months from its entry. (Id.)
19. **MOTION TO SET ASIDE FINAL DECREE—JURISDICTION—PROHIBITION.**—A writ of prohibition will lie to restrain a superior court from entertaining a motion to set aside a final decree of divorce

**DIVORCE (Continued).**

after the expiration of the time provided by section 478 of the Code of Civil Procedure. (Id.)

20. **INTERLOCUTORY DECREE—DEATH OF SPOUSE—PROPERTY RIGHTS—JURISDICTION TO ENTER FINAL DECREE.**—While the death of one of the spouses after the entry of an interlocutory decree of divorce and before the entry of the final decree divests the court of jurisdiction to make a final decree dissolving the marriage status, the property rights of the parties fixed by an agreement between them and confirmed by the interlocutory decree remain in existence, and as to them the court retains jurisdiction to enter the final decree in the manner specified in the interlocutory decree. (Opinion of supreme court on denial of hearing.) (Id.)

See Place of Trial, 2; Records, 1-4.

**EASEMENTS.****IRRIGATION CANALS—DIVISION OF TRACT—IMPLIED UNDERSTANDING.**—

Where the owner of a tract of land sells a portion thereof across which are constructed certain ditches or canals which are the visible and obvious means of transporting water to the remainder of the tract, in the absence of an express understanding, an implied understanding arises that the burdens and correlative advantages due to the presence of such ditches or canals shall continue as they existed before the separation of the title. (Paltuzian v. Terkanian, 47.)

**EJECTMENT.** See Vendor and Vendee, 6.

**ELECTRICITY.** See Negligence, 8.

**EMPLOYER AND EMPLOYEE.** See Negligence, 24-26; Workmen's Compensation Act, 3.

**EQUITABLE GARNISHMENT.** See Mechanics' Liens, 8.

**EQUITY.**

**FRAUD—NEGLIGENCE—INJURY TO TWO INNOCENT PARTIES—WHO MUST SUFFER—EQUITY.**—As between two innocent parties who have both suffered from the fraud of a third the loss must fall where the course of business has placed it, if no fault or negligence is imputable to either party; but where the fault or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by one who by his conduct has rendered the injury possible. (Security Mortgage Co. v. Delfs, 599.)

See Husband and Wife, 7; Mortgages, 5; Partnership, 3; Quiet-ing Title, 4; Trade Names, 2; Vendor and Vendee, 6.

## ESTATES OF DECEASED PERSONS.

1. **PRESENTATION OF CLAIM AS PREREQUISITE TO SUIT.**—The presentation of a claim for damages arising out of an alleged wrongful attachment, or for attorney's fees for services rendered the estate after the death of the decedent but prior to the appointment of a special administrator, is a necessary prerequisite to the bringing of a suit thereon. (*Title Ins. etc. Co. v. Gould*, 533.)
2. **ATTORNEY'S FEES—NATURE OF CHARGE—PROPER EXCLUSION OF EVIDENCE.**—Attorney's fees are not charges directly against the estate of a deceased, but are allowances made to the administrator or executor; therefore, in an action upon a promissory note by the special administrator of the estate of the deceased payee, testimony to sustain an alleged cause of action, by way of cross-complaint, for compensation for services as attorney rendered by the maker of the note to such estate after the death of the payee but prior to the appointment of plaintiff as special administrator, is properly excluded. (*Id.*)
3. **DEATH OF ADMINISTRATRIX—FINAL ACCOUNT—FAILURE TO FILE CLAIM—JURISDICTION.**—The jurisdiction of the court to compel an administrator to render a final account of his intestate's administration of a given estate is not lost by the failure of the successor of such intestate in the administration of such estate to present a claim against the estate of the deceased administratrix. (*In re Philbrook*, 678.)
4. **REVOCATION OF LETTERS PRIOR TO DEATH—FINAL ACCOUNT BY PERSONAL REPRESENTATIVE—JURISDICTION.**—The fact that the letters of administration of such deceased administratrix were revoked before her death did not deprive the court of jurisdiction, in a proceeding under section 1639 of the Code of Civil Procedure, to require her personal representative to render the final account which she had not rendered. (*Id.*)

See Accounts, 2-5; Attorney at Law, 1; Evidence, 1; Habeas Corpus, 2; Judgments, 1; Promissory Notes, 16; Quieting Title, 5.

## ESTOPPEL.

1. **PLEADING.**—If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel shall be pleaded in technical terms. (*Palvutjian v. Terkanian*, 47.)
2. **EQUITABLE DEFENSE—PLEADING AND PROOF.**—In an action to recover a note and mortgage and certain sums of money alleged to have been collected thereon, if a defendant intends to interpose the equitable grounds of estoppel, it is incumbent upon him to specially plead, and to prove, the facts constituting such defense. (*Stoner v. Security Trust Co.*, 216.)



**ESTOPPEL (Continued).**

3. **DUTY TO INFORM OF REAL FACTS.**—No estoppel arises where a party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself. (*Stein v. Sunset Road Oil Co.*, 334.)
4. **ESSENTIALS OF—EFFECT OF SILENCE.**—In order to constitute an estoppel it must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped. There must be an intentional deceit or gross negligence shown, and if silence is relied upon to constitute the estoppel, such silence must be willful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict; but where there is no duty to speak, mere silence will not create an equitable estoppel. (*Id.*)
5. **PLEADING.**—While the general rule requires an estoppel to be pleaded, there is an exception to this rule where the party is without knowledge that his claim must ultimately rest upon an estoppel. (*Guy v. Leech*, 704.)

See Appeal, 11; Contracts, 15; Execution Sales, 2; Judgments, 20, 21; Landlord and Tenant, 1; Leases, 1; Liens, 1; Mortgages, 4; Pledges, 3; Promissory Notes, 6; Property, 1; Street Law, 7.

**EVIDENCE.**

1. **SERVICES RENDERED BY WIFE TO DECEASED—ACTION BY HUSBAND TO RECOVER COMPENSATION—COMPETENCY OF WIFE AS WITNESS.**—In an action by a husband against the executors of an estate to recover compensation for services rendered the deceased by plaintiff's wife, the latter is not disqualified from being a witness for the plaintiff by the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. It is not intended by that section to extend the disqualification to any except parties or assignors of parties. (*Bayless v. Reed*, 139.)
2. **TRIALS—UNIMPEACHED EVIDENCE—DISREGARD BY COURT.**—A court may not arbitrarily disregard the unimpeached evidence of a single witness. (*Hynes v. White*, 549.)
3. **COMPELLING PRODUCTION OF PRIVATE BOOKS OR PAPERS—CONDITIONS PRECEDENT TO ORDER.**—As a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination, it must be made to appear, by clear and unequivocal proof, that the book or document contains evidence relevant and material to the issues before the court and that the precise book, paper, or document containing such evidence has been so designated or described that it may be identified. (*Pyper v. Jennings*, 623.)

## EVIDENCE (Continued).

4. **TRIALS—ACTION ON NOTES AND FOR MONEY LOANED—CONFLICTING EVIDENCE—PROVINCE OF TRIAL COURT—FINDING—APPEAL.**—In this action, in four counts, three of which were upon promissory notes and the fourth for money loaned, the evidence of plaintiff and defendant being conflicting, the trial judge was required to determine whether he should believe the evidence offered on behalf of plaintiff or the confessions of fraud and swindling offered to support the position of defendant, and he having found in favor of plaintiff, his conclusion was not subject to reversal by the appellate court. (*Conrad v. La Plante*, 700.)
5. **RIGHT OF TRIAL COURT TO DISREGARD.**—Where the testimony of a defendant stands uncontradicted, and his statements do not bear the imprint of inherent improbability, the trial court is not authorized to disregard them. (*Hutchison v. Holland*, 710.)
6. **SUFFICIENCY OF TO PROVE FACT—SUBMISSION OF QUESTION TO JURY—WHEN NOT NECESSARY.**—In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture, or surmise, that the fact is as alleged. It must be such that a rational, well constructed mind can reasonably draw from it the conclusion that the fact exists. When the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury. (*Ross v. Railways Co.*, 753.)
7. **WHEN DIRECTED VERDICT PROPER—CONFLICT IN EVIDENCE.**—A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence; and to warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. (*Id.*)
8. **ACTION FOR VALUE OF PUMP AND SERVICES—REASONABLE VALUE OF LABOR EXPENDED—EXPERT TESTIMONY.**—In this action to recover the value of a pump installed by plaintiff on the defendants' ranch, pursuant to a contract for the purchase of the same, and for services and accessories in connection with its operation, the court properly permitted the manager of the plaintiff, who, before becoming manager for the plaintiff, had for many years been engaged in the pumping and engine business, and as a designer and chief engineer of an iron works, to testify as an expert as to the reasonable value of the mechanical labor expended on the pump. (*Krogh Mfg. Co. v. Churchill*, 785.)
9. **SPEED OF OPERATION OF PUMP—PROPER CROSS-EXAMINATION.**—In such action, a witness called by the defendants to testify to certain work he had done on the pump after its installation who, on his direct examination, gave his expert opinion as to its con-

**EVIDENCE (Continued).**

struction and testified that in installing a pump it was necessary to regulate its capacity in accordance with the volume of water in the well, was properly allowed to be questioned, on cross-examination, regarding the speed of the pump in operation in relation to the amount of water in the well. (Id.)

10. **CONTRADICTIONS IN TESTIMONY—PROVINCE OF TRIAL COURT.**—In such an action, contradictions in the testimony of the witnesses for the plaintiff and the defendant as to whether the pump was properly constructed and installed and the weight to be given to the testimony of each of the witnesses is a matter addressed to the discretionary consideration of the trial court. (Id.)

See Accounts, 2, 4, 6; Adverse Possession, 2, 3; Alienation of Affections, 1, 2; Animals, 1, 2; Appeal, 1, 10, 13; Attorney at Law, 3, 4; Automobile Insurance, 6; Bonds, 1, 3; Broker's Commissions, 1; Claim and Delivery, 1, 6; Common Carriers, 4; Contracts, 17, 19, 22, 27, 28, 30; Conversion, 2; Criminal Law, 1, 6-8, 15, 17, 19, 20, 22-24, 29; Damages, 3; Estates of Deceased Persons, 2; Homesteads, 5; Husband and Wife, 10-12; Insolvency, 10; Judgments, 12, 21; Juries and Jurors, 1; Libel, 3, 5, 9, 15, 19; Medical Practice Act, 3, 4; Negligence, 1, 3-5, 7, 9, 12, 13, 15-17, 23, 27, 28, 30, 33, 37-39, 43, 44; New Trial, 3; Nuisances 1; Pleading, 6; Promissory Notes, 7, 15, 17, 18; Property, 2; Quieting Title, 1, 7, 8; Records, 2; Red-light Abatement Act, 5; Slander, 2, 3; Street Law, 6; Taxation, 3; Trade Names, 1; Trusts, 1; Vendor and Vendee, 4, 5; Workmen's Compensation Act, 9.

**EXECUTION.** See Judgments, 10; Quieting Title, 1; Supplementary Proceedings, 1; Trusts, 1.

**EXECUTION SALE.**

1. **EXECUTION—SALE OF REAL PROPERTY—TITLE OF PURCHASER—NECESSITY FOR DEED.**—Under section 700 of the Code of Civil Procedure, a purchaser of real property under execution sale, from the time he receives his certificate of sale, is endowed with the full legal and equitable title of the judgment debtor, except that within the ensuing period of twelve months after sale an equity of redemption is possessed by the judgment debtor; and the issuance of a deed is not essential to the vesting of title in the purchaser. (*Leaver v. Smith*, 474.)
2. **QUIETING TITLE—ERRONEOUS JUDGMENT—RES JUDICATA.**—Where the purchaser of real property under execution sale, after the period of redemption has expired but before a deed is issued to him, institutes an action to quiet title to the property as against the judgment debtor and the judgment against him, though erroneous, is allowed to become final, he is estopped from thereafter in-

**EXECUTION SALE** (Continued).

stituting a new action to quiet title as against said judgment debtor, notwithstanding that subsequent to judgment in the first action a deed has been issued to him. (Id.)

See Corporations, 1-3.

**EXPENSES.** See Automobile Insurance, 7.

**FALSE PRETENSES.** See Attorney at Law, 4; Criminal Law, 27, 28.

**FEES.** See Appeal, 14, 15.

**FILING.** See Mechanics' Liens, 6.

**FINDINGS.**

1. **FORM OF.**—Findings are not required to be in a particular form, so long as they properly dispose of the material matters at issue. (Stoner v. Security Trust Co., 216.)
2. **DATE OF TRANSACTION—ERRONEOUS FINDING—ABSENCE OF PREJUDICE.**—In such action, the plea of the statute of limitations not having been made, the defendant was not injured by a finding, in accordance with the fourth allegation of plaintiff's complaint, that a given sum of money was loaned by plaintiff to defendant on or about a specified date, from which date the judgment carried interest, whereas the testimony of plaintiff was that the loan was made at an earlier date. (Conrad v. La Plante, 700.)

See Appeal, 1, 12, 20; Attorney at Law, 2; Automobile Insurance, 5; Claim and Delivery, 1; Contracts, 23, 30; Divorce, 6; Evidence, 4; Husband and Wife, 8; Mortgages, 3; Negligence, 29; Promissory Notes, 3; Red-light Abatement Act, 2-5; Street Law, 3; Workmen's Compensation Act, 8.

**FINES.** See Poison Act, 1, 3.

**FIRE.** See Negligence, 3-6, 9.

**FIRE INSURANCE.**

1. **CHANGE OF LOCATION OF GOODS—CONSTRUCTION OF POLICY.**—The removal of goods from the rear to the front of a single two-story brick building, without any increase in the risk or hazard, does not constitute a violation of a provision in a policy of fire insurance purporting to cover said goods while situate in the rear of said building. (Greer-Robbins Co. v. Insurance Co., 63.)
2. **AMBIGUITIES IN POLICY—CONSTRUCTION OF.**—Since the language and terms of insurance policies are framed and formulated by the

**FIRE INSURANCE (Continued).**

insurer, whenever ambiguities occur therein they are to be resolved in favor of the insured. (Id.)

3. **PRELIMINARY PROOF OF LOSS—ACCEPTANCE OR OBJECTION TO BY COMPANY—WHEN LOSS PAYABLE—PREMATURE ACTION.**—Where a fire insurance policy provides in effect that the company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof it shall notify him in writing of its partial or total disagreement with the amount of loss claimed by him, and that all loss shall be payable thirty days after the amount thereof has been ascertained, the company is entitled to a period of twenty days within which to accept or object to the amount of loss claimed by the insured in his preliminary proof of loss and, in the absence of any objection made, the loss becomes payable thirty days after the expiration of such twenty days, and an action brought before the expiration of that period is instituted prematurely. (Mitchell v. Fire Assur. Corp., 750.)

See Appeal, 2.

**FLIGHT.** See Criminal Law, 1.

**FORGERY.** See Banks and Banking, 1-3.

**FRAUD.** See Attorney at Law, 2; Equity, 1; Husband and Wife, 6; Judgments, 15, 18; Mechanics' Liens, 2; Mortgages, 6; Pleadings, 3; Promissory Notes, 2; Trade Names, 1, 2.

**FUNERAL EXPENSES.** See Negligence, 33.

**GAMBLING.** See Landlord and Tenant, 1.

**GIFTS.**

1. **GIVING OF CHECK—NONACCEPTANCE BY DRAWEE.**—A check given to the payee as a gift, and presented to the drawee prior to the death of the drawer, and not accepted or paid prior to such death, but payment of which was rejected for any or no reason, does not constitute a valid gift *inter vivos* or a gift *causa mortis*. (Edwards v. Guaranty Trust etc., Bank, 86.)
2. **REDELIVERY OF PROPERTY TO DONOR—EFFECT OF.**—Where, in the delivery of property from one person to another, all the elements of a gift *inter vivos* are present, the act of the donee in immediately giving absolute possession of the property to the donor does not militate against the gift. (Hynes v. White, 549.)
3. **ESSENTIALS OF VALID GIFT.**—The three requisites of a valid gift are, first, an intention on the part of the donor to make it; second, a delivery to the donee of the thing given; and, third, acceptance by the donee of the thing given. (Id.)

## GIFTS (Continued).

## 4. REVERSION TO DONOR UPON DEATH OF DONEE—VALID CONDITION.—

A gift, coupled with the condition that upon the death of the donee the property shall revert to the donor, is valid. (Id.)

## GUARANTY.

1. ACTION ON—NATURE OF.—A guaranty is an independent contract—that is, it is entirely independent of any contract of debt the payment of which is thus assured—and an action on a guaranty of payment of a note is upon an independent contract of the guarantor with which the principal debtor has nothing to do. (Kelley v. Goldschmidt, 38.)

2. SEVERAL SECURITIES FOR SAME OBLIGATION—CONTRACT OF SURETY—RIGHT OF CREDITOR.—A mortgage or a trust deed given to secure the performance of an obligation to pay money and a guaranty given for the same purpose are each intended to subserve the same purpose, and where both are given to secure one single obligation of that character, the one operates merely as additional security to the other, and the creditor may resort either to the one or the other to enforce the payment of the money to secure the payment of which both were given; but in the case of a contract of surety executed to secure the performance of the obligation which is also secured by a mortgage or other collateral security, the holder of the mortgage or other security is compelled to apply to the payment of the debt the property of the debtor which has been mortgaged to secure the debt. (Id.)

3. SECURITY FOR PAYMENT OF DEBT—WHEN SECURITY FOR GUARANTY.—To justify a court in holding that a mortgage or deed of trust given as security for the payment of a debt was also given as security for the performance of a contract of guaranty of such payment, there would have to be to that effect a clear and unequivocal intent expressed in the mortgage or trust deed. (Id.)

4. ACTION ON—ATTACHMENT.—In an action upon a contract of guaranty, a motion to dismiss an attachment upon the ground that the performance thereof is secured by a deed of trust is properly denied where it is found that such deed of trust was given as security for the payment of the principal debt only, and not as security for the performance of the contract of guaranty of payment of that debt. (Id.)

See Corporations, 8.

## HABEAS CORPUS.

1. ERROR IN EXERCISE OF JURISDICTION.—On *habeas corpus* error in the exercise of jurisdiction cannot be considered. (In re Philbrook, 678.)

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**HABEAS CORPUS (Continued).**

- 2. COMMITMENT OF ADMINISTRATOR—REFUSAL TO RENDER FINAL ACCOUNT—JURISDICTION—PRESUMPTION.**—In the absence of a showing on *habeas corpus* of any facts concerning the contents of the answer filed by the administrator of an estate to the original petition in a proceeding instituted under section 1639 of the Code of Civil Procedure to compel him to render a final account of his intestate's administration of a given estate, it must be presumed that the court's order that he be arrested on the ground that he had refused to obey the citation, though made in his absence and without notice, after the filing of such answer, was in the lawful and proper exercise of the judicial function. (Id.)

See Criminal Law, 12.

**HOMESTEADS.**

- 1. DECLARATION BY WIFE—MOTIVE—COMPLIANCE WITH STATUTE.**—It is immaterial what the motive of the wife may be in declaring a homestead for the joint benefit of herself and her husband on property standing of record in the name of the latter, as it is not legally incumbent upon her to give any reason for her action. All she needs to do is to comply with the statute. (*Michels v. Burkhard*, 162.)
- 2. PRESENCE OF BAD MOTIVE—EFFECT OF DECLARATION—JOINT BENEFIT—LEGAL IMPLICATION.**—Even though the wife's purpose in declaring a homestead on property standing of record in the name of the husband is to harass and annoy the latter and to cloud the title to the property, when the declaration of homestead is so made and recorded it places the property described therein beyond the reach of the creditors of the husband, or sale upon execution for his debts, etc., as effectually as though he filed the same himself and to that extent, the declaration is, by legal implication, for their joint benefit. (Id.)
- 3. DECLARATION ON MORTGAGED PROPERTY—EXTENSION OF LIABILITY BY HUSBAND—PRIORITY OF HOMESTEAD—STATUTE OF LIMITATIONS.**—Where the wife declares and files a homestead on real property which is subject to a mortgage which she and her husband had executed as security for their promissory note, and thereafter and after the maturity of such note, but before the running of the statute of limitations, the husband, without the knowledge or consent of the wife, enters into a stipulation and agreement in writing with the payee of the note and mortgage of the property extending the time of payment on said note and mortgage, such extension of the liability does not preserve the lien of the mortgage as against the homestead after the statute of limitations has run against the liability as originally created. (*Corey v. Matot*, 184.)

## HOMESTEADS (Continued).

4. RESIDENCE UPON PREMISES—OMISSION OF STATEMENT FROM DECLARATION.—Where a declaration of homestead does not contain a statement that the person making it is residing on the premises claimed as a homestead, the homestead is void. (*Olds v. Thorington*, 355.)
5. OMISSION FROM DECLARATION—EXTRANEOUS EVIDENCE INADMISSIBLE.—The right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence. (*Id.*)

## HUSBAND AND WIFE.

1. MARITAL DIFFERENCES—EMPLOYMENT OF ATTORNEY BY WIFE—AGENCY.—Statements by the husband to the wife that “we had better settle up and separate” and “you go ahead and get your counsel and I will get mine,” made because of existing marital differences, but not communicated to the attorney from whom the wife thereupon sought advice as to such marital differences and who subsequently brought an action against the husband for separate maintenance, cannot be construed as creating an agency in the wife with power to make a contract in the name of the husband and binding him to pay for such services rendered to her alone and against him as principal. (*Sumner v. Mohn*, 142.)
2. SUIT FOR SEPARATE MAINTENANCE—LEGAL SERVICES RENDERED WIFE—NECESSARIES—LIABILITY OF HUSBAND.—Legal services rendered to the wife in connection with the bringing of a suit against the husband for separate maintenance does not constitute necessities, for which the husband is liable under section 174 of the Civil Code. (*Id.*)
3. RIGHTS OF WIFE—HOW PROTECTED—IMPLIED POWER TO PLEDGE HUSBAND’S CREDIT.—Section 137 of the Civil Code guarantees the wife full and complete relief and provides the means necessary for securing her rights in the prosecution of a suit for separate maintenance, and, in the absence of necessity for pledging the husband’s credit, no implied power to do so exists. (*Id.*)
4. POWER OF WIFE TO CONTRACT FOR LEGAL SERVICES—RIGHT OF ATTORNEY TO RECOVER FROM HUSBAND.—A wife has no implied power to make a contract for legal services to be rendered for her sole benefit in matters adverse to the husband; and the attorney rendering such services at her request cannot recover therefor in an independent action against the husband. (*Id.*)
5. CONFIDENTIAL RELATIONSHIP—BREACH OF—FRAUD.—The least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the highly confidential relationship which it is the policy of the law to uphold, and is, therefore, fraudulent. (*Patterson v. Blackburn*, 362.)



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**HUSBAND AND WIFE (Continued).**

- 6. KNOWLEDGE OF WRONGS OF HUSBAND—RELIANCE UPON PROMISES TO DO RIGHT—FOREGOING OF LEGAL REMEDIES—RATIFICATION OF FRAUD.**—Neither the fact that the wife, after knowledge of the fraud practiced upon her by her husband by reason of which she was induced to convey certain property to him, accepted his importunities to forego her legal remedies and quitclaimed the property to him, relying upon his renewed promises to sever his meretricious relations with another, which promises he did not keep, nor the fact that in a subsequent action for divorce she failed to describe the property in question, constituted a ratification of the original fraud of the husband, as against his paramour who was a party to such fraud and to whom he had conveyed the property. (Id.)
- 7. ADVANCEMENTS BY PARAMOUR TO HUSBAND—DUTY OF WIFE TO REPAY—EQUITY.**—A court of equity, on determining that an unfaithful husband had defrauded his wife of her property and transferred it to his partner in the entire wrong is not required to compel the wife to adjust the money arrangements between those who wronged her as a condition of the return of her own property. (Id.)
- 8. TITLE TO PROPERTY—HOW ACQUIRED—CONFLICTING EVIDENCE—FINDING—APPEAL.**—In an action in which both the husband and the wife claim title to certain real property, notwithstanding a conflict in the evidence, a finding of the trial court that the wife acquired by assignment from her sister, as a gift, the latter's equity in a contract for the purchase of the property, is conclusive on the appellate court. (Smith v. Smith, 650.)
- 9. EARNINGS OF WIFE—NATURE OF—WHEN SEPARATE PROPERTY.**—Although the earnings of the wife during marriage are, as a rule, community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property. (Id.)
- 10. AGREEMENT AS TO SEPARATE CHARACTER OF WIFE'S EARNINGS—HOW PROVED.**—An agreement between a husband and wife that the earnings of the latter shall be her separate property may be proved by evidence as to the acts and conduct of the husband with relation to the earnings of the wife or business conducted by her as community property indicating that he did not regard them as community property. (Id.)
- 11. RELINQUISHMENT OF BUSINESS TO WIFE—SEPARATE PROPERTY.**—In this action involving, among other things, the right of a wife to a millinery business conducted by her and to the earnings derived therefrom, the evidence as to the manner in which the business had been conducted showed that it had been relinquished by

**HUSBAND AND WIFE (Continued).**

the husband to the wife and had become her separate property. (Id.)

12. **IMPROVEMENT OF WIFE'S PROPERTY—EXPENDITURES BY HUSBAND.**—The expenditures by a husband of either his separate funds or the common funds of himself and wife in improving his wife's separate property does not operate to change the title. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land. (Id.)
13. **ACTION AGAINST WIFE—FAILURE TO SERVE HUSBAND—HARMLESS ERROR.**—Where a wife is sued for legal services contracted by her while an unmarried woman, and concerning matters connected with her property estate, and her husband, a practicing attorney, though joined as a party defendant under the designation John Doe, is not served with a copy of the summons and he does not appear therein, but he aids and conducts her defense and represented her in very stage of the litigation and has actual notice of everything that occurs, and no objection is raised to the defect of parties defendant at any stage of the proceedings, nor to the entry of judgment against the wife alone, the failure to serve the husband is harmless error and under section 4½ of article VI of the constitution is no ground for reversal. (George v. Stensland, 654.)
14. **JUDGMENT—NAME OF DEFENDANT—WAIVER OF OBJECTIONS.**—Where a married woman is sued by her name before marriage, and she answers in that name, but at the trial she admits her proper name and adopts the latter name in her notice of appeal, she cannot complain that judgment was entered against her in the name which she admits is her proper name, the two persons being completely identified in the record as herself. (Id.)

See Agency, 7; Alienation of Affections, 1; Divorce, 13, 17; Evidence, 1; Homesteads, 1; Leases, 3; Pleading, 3; Quiet-  
ing Title, 6.

**INCOMPETENT PERSONS.** See Quiet-  
ing Title, 7.

**INFERENCES.** See Appeal, 1; Negligence, 5.

**INJUNCTION.** See Trade Names, 1.

**INSOLVENCY.**

1. **INSOLVENCY ACT OF 1880—JURISDICTION OF SUPERIOR COURT.**—A superior court, in proceedings in insolvency under the Insolvency Act of 1880, exercises a special or limited jurisdiction; and everything required by that act to give said court the jurisdiction to hear and determine the same or to act in the proceedings must be made affirmatively to appear in the record. If any jurisdic-

## INSOLVENCY (Continued).

tional fact appears, upon the face of the record, to be wanting, the court is wholly without jurisdiction to act or to make any valid order or adjudication in the proceeding. (*Daman v. Hunt*, 274.)

2. **ACTION TO QUIET TITLE—SUFFICIENCY OF COMPLAINT.**—In this action to quiet title, the amended complaint in intervention by the substituted assignee in the matter of an insolvent debtor, under the Insolvency Act of 1880, stated a cause of action, and the general demurrer thereto was properly overruled. (*Id.*)
3. **APPOINTMENT AND QUALIFICATION OF ASSIGNEE—ADMISSION BY FAILURE TO DENY.**—The amended complaint in intervention having alleged the appointment and qualification of the assignee, and that allegation not having been denied, it was in legal effect admitted. (*Id.*)
4. **VACANCY IN OFFICE—CONVEYANCE OF PROPERTY TO SUCCESSOR.**—Where, after the property of the insolvent debtor was conveyed to the assignee "and to his successor and successors in office," the office of assignee became vacant and such vacancy was regularly supplied by the appointment of another to discharge the duties of the office, it was not necessary or requisite that there should be a specific assignment or conveyance of the property of the insolvent's estate to such successor or successors. (*Id.*)
5. **DISMISSAL OF PROCEEDINGS—ABSENCE OF CONSENT—VOID ORDER.**—An order dismissing insolvency proceedings which shows upon its face that it was made without the consent of all parties interested in or affected thereby is void. (*Id.*)
6. **POWER TO SET ASIDE VOID ORDER.**—An order dismissing insolvency proceedings without the consent of all parties interested in or affected thereby being void, a court making such an order may vacate and set aside the same. (*Id.*)
7. **CONVEYANCE OF PROPERTY TO ASSIGNEE—SUBSEQUENT DEED BY INSOLVENT—VALIDITY OF.**—After the property of the insolvent debtor has been conveyed to the assignee and to his successor and successors in office, a deed of conveyance of the property by the insolvent debtor to a stranger to the insolvency proceedings is void, notwithstanding that prior to such attempted conveyance the court, acting in excess of its jurisdiction, ordered the insolvency proceedings dismissed. (*Id.*)
8. **FAILURE OF ASSIGNEE TO FILE BOND—VALIDITY OF CONVEYANCE BY.**—Where the original assignee, in proceedings in insolvency under the Insolvency Act of 1880, dies and a successor is regularly appointed by the court but he fails to file a bond as assignee, as required by the act, he is without authority to exercise the duties of his office, and a conveyance by him of the property

**INSOLVENCY (Continued).**

of the insolvent debtor which was conveyed to the original assignee, is void. (Id.)

9. **DELAY IN PROSECUTION OF PROCEEDINGS—ABANDONMENT OF PROPERTY.**—After the real property of the insolvent debtor is conveyed to the assignee, the fact that the administration of the estate of the insolvent remains in abeyance or is dormant because the proceedings in insolvency are not promptly prosecuted to a final determination does not of itself constitute an abandonment of such real property as a part of the assets of the insolvent estate to be subjected to the extinguishment of the liabilities of the insolvent. (Id.)
10. **ABANDONMENT—QUESTION OF FACT—INTENTION—BURDEN OF PROOF.** In such a case, the question of abandonment is one of fact to be determined by the jury or the court, if the issues of fact are tried by the court, and the burden is upon the person relying upon an abandonment of the property to show that there was an intention in the assignee to abandon the property. (Id.)
11. **ACTION BY INTERVENER TO QUIET TITLE—STATUTE OF LIMITATIONS.** In an action to quiet title by the grantee of an insolvent debtor, a complaint in intervention by the assignee of the estate of such insolvent debtor to quiet title to the property in question as against the parties to the original complaint and in favor of the intervener, in effect, is for the recovery of real property, and the time within which such complaint in intervention should be commenced is governed by section 318 of the Code of Civil Procedure. (Id.)
12. **APPOINTMENT OF ASSIGNEE TO RECONVEY TO INSOLVENT—VOID ORDER.**—An order, made after the death of the original assignee, appointing an assignee for the limited purpose of making a conveyance to the insolvent of the property conveyed to the original assignee is unauthorized by the Insolvency Act of 1880, and, therefore, void. (Opinion of supreme court on denial of hearing.) (Id.)

**INSTRUCTIONS.** See Animals, 2, 3; Criminal Law, 4, 9, 14, 20; Malicious Prosecution, 1; Negligence, 13, 18; Slander, 1, 3.

**INSURANCE.** See Automobile Insurance; Fire Insurance, 3.

**INTENT.** See Automobile Insurance, 5; Contracts, 12; Criminal Law, 15, 16; Leases, 2; Slander, 2.

**INTEREST.** See Automobile Insurance, 8; Promissory Notes, 10.

**IRRIGATION.**

1. **WRIGHT IRRIGATION ACT—NEW CONSTRUCTION WORK—ADOPTION OF PLANS AND APPROVAL BY LAND OWNERS.**—The whole purpose and

**IRRIGATION (Continued).**

scope of the Wright Irrigation Act, so far as it relates to new construction work, rests upon the adoption of plans and the approval of the land owners of the district, and it does not rest primarily with the directors, who are not, specifically or otherwise, empowered to carry on any new work without such previous authorization. (*Buschnann v. Turlock Irr. Dist.*, 321.)

2. **MANDAMUS TO COMPEL CONSTRUCTION OF SERVICE DITCHES—INSUFFICIENT COMPLAINT.**—In an action seeking a writ of mandate directing an irrigation district organized under the Wright Irrigation Act and the directors of such irrigation district to build a new branch or service ditch from its main canal to the lands of plaintiffs, the complaint fails to state a cause of action where there is nothing therein from which it can be inferred that the land owners of the district have adopted any plans calling for the construction of other than main and lateral canals, or of any canal or ditch which the plaintiffs seek to have constructed by order of the court, and it does not appear therefrom what the proposed work would cost, nor whether, if authorized by the district, the two per cent assessment provided for in section 39 of the act, if otherwise applicable, would prove adequate to defray the expense of the undertaking. (*Id.*)

3. **RATABLE DISTRIBUTION OF WATER—CONSTRUCTION OF SECTION 18 OF ACT.**—Section 18 of the Wright Irrigation Act, which provides "that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district," neither authorizes nor commands the construction of either main, branch, or lateral canals or service ditches which have not been otherwise provided for, but merely directs how the water available for irrigation purposes shall be apportioned when the land owners have their lands prepared for irrigation. (*Id.*)

See Easements, 1.

**IRRIGATION DISTRICTS.** See Bonds, 1, 3.

**ISSUES.** See Claim and Delivery, 5.

**JUDGMENTS.**

1. **ACTION AGAINST EXECUTOR—FORM OF JUDGMENT.**—In an action against the executors on a rejected claim against the estate of the deceased, a personal judgment against the defendants, without directing, as required by section 1504 of the Code of Civil Procedure, that the payment thereof be made by defendants in the due course of administration, is erroneous; but such error

## JUDGMENTS (Continued).

may be corrected by a modification of the judgment. (*Dyer v. Minturn*, 1.)

2. **ACTIONS TO SET ASIDE DEEDS—RES ADJUDICATA.**—A judgment in favor of the defendants in an action to set aside certain deeds upon the grounds of undue influence and fraud is *res adjudicata* in a subsequent action between the same parties to set aside said deeds upon the grounds of undue influence and mental incompetency, notwithstanding in such former action plaintiff's proof of undue influence was excluded by the court upon the ground that the complaint failed to state sufficient facts, and plaintiff accepted that ruling of the court, failed to amend, and did not appeal. The fact that the judgment may have been based upon a defective complaint did not render the judgment void, nor minimize its effectiveness concerning all issues raised by the pleadings. (*Little v. Smith*, 8.)
3. **MOTION TO VACATE—GROUNDS.**—A motion to vacate a judgment on the ground that the conclusions of law are not consistent with, nor supported by, the findings is permissible under sections 663 and 663a of the Code of Civil Procedure. (*Dolan v. Superior Court*, 235.)
4. **ENTRY THROUGH INADVERTENCE—RELIEF.**—Relief from judgments entered through inadvertence, surprise, or excusable neglect must be sought by a motion made under section 473 of the Code of Civil Procedure. (*Id.*)
5. **ORDER VACATING JUDGMENT—REVIEW ON APPEAL—POWER OF TRIAL COURT TO VACATE.**—Assuming the validity of an order setting aside a judgment in part, it is subject only to be set aside on appeal or under proper proceedings under section 473 of the Code of Civil Procedure. The trial court has not the power, of its own motion and without notice to the parties affected, to make a second order vacating such first order, even though the latter order was inadvertently made. (*Id.*)
6. **MOTION TO VACATE—POWER OF COURT—ENTRY OF NEW JUDGMENT.**—On a motion under sections 663 and 663a of the Code of Civil Procedure, the only order within the power of the court is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void, and not merely erroneous. (*Id.*)
7. **VOID ORDER SETTING ASIDE—POWER OF COURT TO VACATE.**—A trial court may, of its own motion and without notice to the parties affected, make an order vacating a previous order, made on a motion under sections 663 and 663a of the Code of Civil Procedure,

**JUDGMENTS (Continued).**

purporting to set aside a judgment in part, where the latter order did not direct what judgment should be entered. (Id.)

8. **RES ADJUDICATA.**—A former judgment between the same parties is conclusive not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question. (*Kinderman v. Shipley*, 270.)
9. **MOTION FOR JUDGMENT—AFFIRMATIVE DEFENSES DEEMED TRUE.**—Upon a motion for judgment upon the pleadings, all matters affirmatively set up in the answer of the defendants must be deemed to be true. (*Hill v. Moore*, 353.)
10. **SALE ON EXECUTION—SATISFACTION BY PURCHASER—ORDER VACATING—APPEAL.**—A judgment in this state cannot be sold under execution; and an appeal will not lie from an order of the superior court vacating a satisfaction of judgment entered by the clerk, based upon a satisfaction of judgment executed by the purchaser of the judgment at an execution sale. (*Judnick v. Judnick*, 380.)
11. **SURETIES ON STAY BOND—JUDGMENT AGAINST BY CONSENT—RIGHT OF ORIGINAL JUDGMENT DEBTORS TO APPEAL.**—Where the judgment entered against the sureties on a stay bond is in effect a consent judgment and, therefore, unappealable by the sureties, the original judgment debtors cannot appeal from that judgment upon the theory that they are privies of the bondsmen. (Id.)
12. **FOREIGN JUDGMENTS—ACTION ON—EVIDENCE.**—In an action upon a foreign judgment, an authenticated copy of the judgment alone, without the judgment-roll, is properly received in evidence. (*Uplinger v. Yonkin*, 435.)
13. **PERSONAL SERVICE OF SUMMONS—RECITAL IN JUDGMENT—PRESUMPTION.**—In view of the provision of the constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings of every other state, and of the presumption contained in subdivision 16 of section 1963 of the Code of Civil Procedure, it will be presumed that the court had jurisdiction to render such judgment, where it is authenticated by a certificate reciting that said court is a court of record, having a seal, and the judgment itself recites "that due personal service of process of summons issued in said cause has been had on the defendant." (Id.)
14. **FOREIGN JUDGMENTS—ACTION ON IN THIS STATE—CONSTITUTIONAL LAW—JURISDICTION.**—While, under article IV, section 1, of the constitution of the United States, which requires courts of one state to give full faith and credit to the judgments of a sister state, suit may be maintained in this state on a final judgment rendered in another state, that clause of the constitution applies to records and proceedings of courts only so far as they have

**JUDGMENTS (Continued).**

- jurisdiction. The jurisdiction of the court rendering the judgment is always open to inquiry under proper averments where its conclusiveness is questioned in another state. (*Gordon v. Hillman*, 571.)
15. **RESISTANCE TO ACTION ON—FRAUD—WANT OF JURISDICTION.**—An action on a judgment rendered in another state may be resisted on the ground of fraud which goes to the jurisdiction of the court to render the questioned judgment either with respect to the subject matter or of the person, or which constitutes a fraud upon the law of the forum, or which operates to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it. (*Id.*)
16. **SETTING ASIDE OF—REVERSAL OF DEFAULT JUDGMENT BASED ON.**—If the original judgment rendered in a sister state has been set aside prior to the making of a motion to set aside a default judgment rendered thereon in this state, such default judgment will be reversed as a matter of right and restitution will be awarded to the defendant. (*Id.*)
17. **SETTING ASIDE OF FORMER JUDGMENT—EFFECT OF—RIGHT OF JUDGMENT DEBTOR.**—The effect of setting aside a former judgment is the same as where suit is brought on a judgment which is thereafter reversed on appeal when the judgment debtor is entitled to have the second judgment set aside as of record and as of right. (*Id.*)
18. **PENDENCY OF PROCEEDINGS TO VACATE—MOTION TO VACATE DEFAULT JUDGMENT BASED ON—RIGHT OF DEFENDANT.**—While a motion under section 473 of the Code of Civil Procedure is addressed to the discretion of the court and its action will not be disturbed on appeal, unless it shall be made clearly to appear that such discretion has been abused, such a motion to set aside a default judgment entered in an action to recover upon a judgment rendered in a sister state should be granted, where the motion is made within the six months limited by that section and it is shown that proceedings are pending in the sister state to set aside the original judgment on the ground of fraud and the issue of fraud is tendered by the answer accompanying the notice of motion. (*Id.*)
19. **CHANGED FACTS—RES ADJUDICATA.**—The fact that the court in one action decides that the sheriff might proceed with a sale under execution of the contingent interest of a judgment debtor in certain real property held by a trustee for the benefit of certain creditors of such judgment debtor does not render that question *res adjudicata* in a subsequent action instituted after such a judgment debtor has ceased to have any interest in the property. (*Kibbe v. Graves*, 575.)



## JUDGMENTS (Continued).

20. **ACTION ON INSTALLMENT CONTRACT—FRAUD—ADVERSE FINDING—SUBSEQUENT ACTION—DEFENSES—ESTOPPEL.**—Where the court, in an action to recover certain unpaid monthly installments due under a contract for the purchase of a motion picture orchestra, finds adversely to the defendant as to its allegation of fraudulent acts of plaintiff which are set up as a defense, the defendant is thereby estopped to allege said facts as a defense to a second action by plaintiff to recover subsequent unpaid monthly installments. (*Glockner v. Palace Amusement Co.*, 597.)
21. **FORMER JUDGMENT AS ESTOPPEL—PLEADING—PROOF.**—In such subsequent action it is not necessary that plaintiff plead the former judgment as an estoppel, but when the defendant by his answer tenders the same issue presented in the former action, plaintiff is entitled to offer evidence of the facts constituting such estoppel. (*Id.*)
22. **ORDER DISMISSING ACTION—RIGHT OF APPEAL.**—An order dismissing an action under section 581a of the Code of Civil Procedure is, when entered upon the minutes of the court, a final judgment from which an appeal may be taken. (*Boyer v. City of Long Beach*, 617.)
23. **RELIEF FROM — REMEDIES—TIME.**—The time within which relief may be sought by appeal or motion under section 473 of the Code of Civil Procedure is limited by statute, and the time within which *certiorari* or a suit in equity may be instituted is determined by the equities of the case. (*Id.*)
24. **MOTION TO VACATE—TIME.**—There is no statutory authority for a motion to set aside a judgment after the period fixed by section 473 of the Code of Civil Procedure has expired, if such judgment is not void on its face because of want of jurisdiction of the subject matter. (*Id.*)
25. **ORDER DISMISSING ACTION—RECORD—PRESUMPTIONS.**—In the absence of the record of the proceedings had on the hearing of the motion to dismiss, on an appeal from an order denying a motion to set aside an order dismissing an action on the ground that the summons was not served on the defendant within three years and it had not appeared in the action, the presumption is that the motion to dismiss was made by an attorney of record and that it was supported by affidavits or other evidence. (*Id.*)
26. **APPEARANCE BY DEFENDANT—DETERMINATION BY TRIAL COURT—HOW REVIEWED.**—A determination by the trial court, on a motion to dismiss an action, that a notice of substitution of attorneys for defendant, which was served on plaintiff, did not constitute an appearance by defendant—failure of service of summons being admitted—may be reviewed on appeal from an order granting the motion. (*Id.*)

## JUDGMENTS (Continued).

## 27. JUDGMENT OF DISMISSAL—STIPULATION FOR—RES ADJUDICATA.—

Where the parties to an action, through their respective counsel, stipulate in open court for the dismissal of the action and the payment of their respective costs, and judgment of dismissal is thereupon entered, that judgment constitutes a bar to another suit afterward brought upon the same cause of action. (McCord v. Martin, 717.)

## 28. RECITALS IN—WHEN CONCLUSIVE.—The recitals in a judgment of dismissal showing that the parties to the action, through their respective counsel, stipulated to the dismissal of the action and the payment of their respective costs, in the absence of evidence to the contrary, are conclusive upon the parties. (Id.)

## 29. ENTRY UPON STIPULATION—JUDGMENT ON MERITS.—Where the parties appear in open court and stipulate for a dismissal the situation is not covered by section 581 of the Code of Civil Procedure, but a judgment entered thereon is a judgment on the merits as contemplated by section 582 of said code. (Id.)

See Appeal, 4; Attachment, 2; Claim and Delivery, 2, 7; Criminal Law, 11; Default, 3; Divorce, 12, 14-16, 18-20; Execution Sales, 2; Husband and Wife, 14; Leases, 1; Maintenance, 1; Mechanics' Liens, 3; Mortgages, 1, 2; Partnership, 1; Promissory Notes, 12; Quieting Title, 3, 5; Records, 1; Red-light Abatement Act, 4; Supplementary Proceedings, 2.

JUDICIAL NOTICE. See Workmen's Compensation Act, 4.

## JURIES AND JURORS.

## INTEREST OF JURORS IN SURETY COMPANY—PROPER EXAMINATION.—

Upon their *voir dire* it is not error to ask the jurors as a body whether or not they are the owners of stock in a given surety company. (Williamson v. Hardy, 377.)

See Criminal Law, 10.

JURISDICTION. See Contracts, 1; Criminal Law, 11, 12; Divorce, 10; Estate of Deceased Persons, 8; Habeas Corpus, 1, 2; Insolvency, 1, 5-8, 12; Judgments, 13-15; Negotiable Instruments, 3; New Trial, 2; Place of Trial, 1, 2; Police Courts, 1; Street Law, 8, 9; Supplementary Proceedings, 1; Trial, 2; Workmen's Compensation Act, 2.

JUVENILE COURT ACT. See Parent and Child, 1.

## LANDLORD AND TENANT.

USE OF PREMISES FOR UNLAWFUL PURPOSE—DAMAGES—KNOWLEDGE OF LANDLORD—ESTOPPEL.—A lessor is estopped to claim damages from the lessee due to the fact that the latter has conducted a

**LANDLORD AND TENANT (Continued).**

gambling house in a residence leased by the former to the latter, thereby injuring the reputation of the house, where the lease of said premises was with the intention of both parties that the same should be so used. (*Pratt v. Padgett*, 563.)

**LARCENY.** See *Leases*, 2.

**LAW OF CASE.** See *Appeal*, 17.

**LEASES.**

1. **JUDGMENTS—BREACH OF LEASE—ACTION FOR DAMAGES—CROSS-ACTION FOR BREACH—PREVIOUS ADJUDICATION—ESTOPPEL.**—In an action for damages for breach of a covenant to pay rent, the defendant is estopped to set up as a defense and cross-action for damages that after the execution of the lease the plaintiff closed up one of the main entrances to the premises from the public street, thus greatly reducing the value of the use of the premises, and destroying the profits of defendant's leasehold, where the identical issue of fact was presented in a previous action between the parties in a justice's court to recover one month's rent and on a trial *de novo* in the superior court that issue was determined adversely to the defendant. (*Kinderman v. Shipley*, 270.)
2. **APARTMENT-HOUSE KEEPER—WITHHOLDING POSSESSION OF TENANT'S PROPERTY—DISPUTED CLAIM—LARCENY.**—Where the person renting a furnished apartment undertakes and agrees to leave the apartment "clean" upon vacating it, or to pay for cleaning the same, and agrees that the owner should have a lien upon his personal property for all unpaid charges under the agreement between them, and, upon the vacating of the apartment, a dispute arises as to whether the apartment is clean, the owner cannot be held for larceny for withholding possession of property of the tenant until the dispute between them can be legally determined, felonious intent is an essence of the crime of larceny. (*In re Bayles*, 517.)
3. **CONTRACTS—LEASE OF NEWSPAPER ROUTE—SIGNATURE BY WIFE OF LESSOR WITHOUT AUTHORITY—LIABILITY OF LESSEE FOR NEWSPAPERS RECEIVED.**—A written agreement leasing a newspaper route, signed by the lessee, the name of the lessor being signed by his wife without written authority from him, is binding upon the lessee where he received from the lessor a large number of the newspapers for which, in such instrument signed by him, he promised to pay. (*Straus v. Eaton*, 538.)
4. **ORAL ASSIGNMENT—VALIDITY OF.**—The lessor of a newspaper route may make an oral assignment of the amount due thereunder from the lessee to him; and he may orally authorize another to make such an assignment. (*Id.*)

## LEASES (Continued).

5. ACTION TO RECOVER BALANCE DUE—NUMBER OF PAPERS DELIVERED—DEMURRER FOR UNCERTAINTY.—In an action against the lessee of a newspaper route to recover a balance alleged to be due for newspapers delivered under a written lease wherein it is provided that the lessee shall pay a given price per hundred copies, if the complaint fails to state the number of copies delivered, a demurrer on the ground of uncertainty should be sustained. (Id.)
6. IMMORAL CONSIDERATION—LOCUS PENITENTIAE ACCORDED LESSOR—RELIEF.—While the law will afford a woman, the owner of land in fee and in possession, no redress for the use of such land by a man under a lease, the consideration for which was in part that they (though not husband and wife) should live together thereon and should cohabit as man and wife, it will, as to the unexpired portion of the term of such lease, upon a showing by her of repentance, abandonment, and discontinuance of the shameful relation, grant her redress by quieting her title to the land as against such lease. (Glos v. McBride, 688.)

See Appeal, 12; Landlord and Tenant.

## LETTERS. See Alienation of Affections, 1.

## LIBEL.

1. TRUTH AS DEFENSE—INNUENDO.—Where the defendant in a libel case sets up the truth as a defense, he must justify the words in the sense in which the *innuendo* explains them, assuming, of course, that the words are capable of the meaning imputed to them by the *innuendo*. (Pyper v. Jennings, 623.)
2. PLEA OF JUSTIFICATION—SCOPE.—The general rule is that the plea of justification in a libel case must be as broad as the charge, and, in point of law, must be identical with it. (Id.)
3. REPUTATION—HOW PROVED.—Reputation, or, as it is sometimes called, character, is a fact to be proved by the testimony of witnesses who know it, not by the proof of specific instances of misconduct which may or may not have affected it injuriously. (Id.)
4. STATEMENTS CONCERNING RE-ELECTION OF MAYOR—CONFIDENCE OF ELECTORS—UNJUSTIFIED INNUENDO.—A publication concerning the mayor of a city, "They were surprised you ever put him in office, dumbfounded at his re-election, and amazed beyond measure that you continue to put up with him," the word "they" referring to certain northern neighbors and the word "him" to the mayor, does not justify an *innuendo* to the effect that he was not worthy of the confidence of the electors. (Id.)
5. CHARGE OF BAD REPUTATION IN GIVEN LOCALITY—HOW JUSTIFIED.—A publication concerning the mayor of the city of San Diego that he might go to Tia Juana (Mexico) and get one hun-

**LIBEL (Continued).**

dred men to stand by him, the intention of the article being to convey the implication that his reputation among the habitués of the latter place is such that they believe he is not a citizen of good morals or integrity, or of good character, and is not acting in good faith in his declared purpose to suppress crime, and that because they so believed, they will be willing to stand behind him and be guided by him, can be justified only by proof that such is his reputation there and not by proof of specific acts of misconduct. (Id.)

6. **ABSENCE OF CHARGE OF SPECIFIC ACT OF DISHONESTY—VAGUE REFERENCE TO OPINION OF OTHERS—PROOF IN JUSTIFICATION.**—Where the libelous article, without imputing any specific act of dishonesty, seeks to blacken the good name of the object of the defamatory words by vague reference to some ill-defined opprobrious opinion others have of him, without conveying to the readers any sharply edged delineation of that opinion, the defendant can only justify by direct proof of bad, or, at least, impaired, reputation in the community or among the class of persons referred to in the defamatory article. (Id.)
7. **STATEMENT THAT PERSON WORTHY OF CONFIDENCE—UNJUSTIFIED INNUENDO THAT OTHERS NOT WORTHY.**—A published statement that "he [the chief of police] surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I find expressed on all sides," does not justify an *innuendo* that the mayor of the city is not worthy of that confidence. (Id.)
8. **INNUENDO EXPLAINING PUBLICATION—RIGHT TO JUSTIFY IN THAT SENSE.**—The defendant in a libel action may justify the substance of the publication in the sense in which the *innuendo* explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended, or changed by the *innuendo*, and if it is, the *innuendo*, to the extent that it is not borne out by the defamatory words, will be rejected as surplusage. (Id.)
9. **CHARGE OF GAMBLING—PROOF OF MISUSE OF TRUST FUNDS IRRELEVANT.**—Where the defamatory words charge one with the gambling habit, the truth of the charge cannot be proved by evidence that the libeled person has misused funds. (Id.)
10. **WORDS ACTIONABLE PER SE—DAMAGE—PLEADING.**—Words written or printed may be libelous and actionable, *per se*, that is actionable without any allegations of special damage, if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of their friendly intercourse or society, even though the same words, if spoken, would not have been actionable. (*Jimeno v. Home Builders*, 660.)

## LIBEL (Continued).

11. **WHEN PUBLICATION LIBELOUS PER SE.**—If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se*, and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence. (Id.)
12. **IMPUTATION OF DISHONEST PRACTICES.**—A printed and published article which imputes to plaintiff grave and reprehensible misconduct—dishonest practices which, if established, would justly bring him into general contempt and disgrace—is libelous and actionable *per se*. (Id.)
13. **CONSTRUCTION OF PUBLICATION—CONSIDERATION AS WHOLE.**—The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. (Id.)
14. **VIOLATION OF CONFIDENCE—TREACHERY TO ASSOCIATES—EFFECT OF WRITING.**—A writing that charges another with violating a confidence that has been reposed in him or with treachery to his associates is actionable *per se*. (Id.)
15. **ACTION FOR DAMAGES—LETTER CONCERNING PLAINTIFF—FINDING—EVIDENCE.**—In this action for damages for an alleged libel on plaintiff, committed by means of a letter written in the Danish language and delivered to and read by the addressees, close friends of plaintiff, the finding of the trial court that the letter was written of and concerning plaintiff was fully sustained by the evidence. (Peterson v. Rasmussen, 694.)
16. **IDENTITY OF PARTY—USE OF NAME UNNECESSARY.**—To constitute libel a party need not be named in the writing if pointed to by description or circumstances tending to identify him. (Id.)
17. **IMPUTATION OF WANT OF CHASTITY—DAMAGE—PRESUMPTION.**—Words imputing to a woman a want of chastity are actionable *per se*, and damage to her reputation are presumed to result from the publication thereof. (Id.)
18. **PRIVILEGED COMMUNICATION—WHAT CONSTITUTES.**—A privileged communication is one made without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information. (Id.)
19. **BURDEN OF PROVING PRIVILEGE.**—In an action for damages for an alleged libel, the burden of proving the privilege as set up in the answer is upon the defendant. (Id.)

**LICENSE TAXES.**

**BUSINESS OF LAWYER—RIGHT TO LICENSE.**—For the purpose of raising revenue, a municipal corporation has the power to impose a license for carrying on the business of a lawyer at a fixed place of business within the city. (In re Johnson, 465.)

See Ordinances, 2, 3.

**LIENS.**

**PRIORITY OF—ACCEPTANCE OF TRUST DEED SUBJECT TO MORTGAGE IN PAYMENT FOR MATERIAL—RELIANCE UPON BY MORTGAGEE—RIGHT TO CLAIM MECHANIC'S LIEN—ESTOPPEL.**—Where a materialman agrees to accept a trust deed, subject to a mortgage for a specified amount, in payment for material furnished for use in the building of a house, and so advises the mortgagee, and such mortgagee advances the specified amount of money for the purpose of building such house, and such trust deed, subject to such prior mortgage, is executed and delivered to him, he will be estopped to set up as against the mortgagee that he did not accept the trust deed in payment for his material and in lieu of any lien which the law allowed therefor, notwithstanding the mortgagor subsequently became involved in financial difficulties and did not complete the house. (Guy v. Leech, 704.)

See Agency, 5; Claim and Delivery, 5; Leases, 2; Mechanics' Liens.

**MAINTENANCE.**

1. **SEPARATE MAINTENANCE—ALLOWANCE OF COUNSEL FEES—APPEAL—PRESUMPTION.**—Where in an action for separate maintenance the husband permits the wife to recover judgment by default, he cannot, on appeal, attack that portion of the judgment allowing her a given sum as attorney's fees in said action on the theory that the services of counsel were completed before such allowance was made and, therefore, no award was necessary for the prosecution of the action. It will be presumed, in support of such judgment, that plaintiff proceeded in the usual and customary way by moving the court for an allowance of counsel fees necessary for the prosecution of the action and that such motion was granted by the court, as evidenced by its final judgment. (Sherman v. Sherman, 208.)
2. **PLEADING—ASSIGNMENT OF COMMUNITY PROPERTY TO WIFE—ERRONEOUS JUDGMENT.**—In an action for separate maintenance, where the allegations of the complaint relating to the community property are inserted for the purpose of procuring an injunction to restrain the defendant from disposing of such property and the judgment is by default, the court is not authorized to award the plaintiff the sum which she alleges is necessary for her support

**MAINTENANCE (Continued).**

and maintenance, and which she prays that the court award her for that purpose, and in addition thereto assign her all the community property. (Id.)

See Husband and Wife, 2, 3.

**MALICE.** See Criminal Law, 15; Slander, 1-3.

**MALICIOUS PROSECUTION.**

**ADVICE OF COUNSEL—ERRONEOUS INSTRUCTION.**—In an action for malicious prosecution an instruction that the jury should disregard the special defense of advice of counsel if they believe from the evidence that defendant did not state "to his attorney or to the district or deputy district attorney, or any or either of them, all the facts within his knowledge," etc., is erroneous in that it requires the jury to find that defendant made a full and fair disclosure of all the facts within his knowledge respecting the transaction complained of to each one of the three attorneys consulted by him, whereas proof of a full and fair disclosure of such facts to any one of the three would have been sufficient to sustain such defense if defendant acted upon the advice of the attorney to whom such disclosure was made. (Wright v. Baldwin, 147.)

**MANDAMUS.** See Police Officers, 1-4.

**MAYHEM.** See Criminal Law, 15-19.

**MECHANICS' LIENS.**

1. **PLEADING—CONSOLIDATION OF ACTIONS FOR TRIAL.**—Where several actions for the foreclosure of mechanics' liens and for deficiency judgments against the contractor and the sureties upon his bond are consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading, the allegations in one complaint remedying the defects or omissions in another. (Tyler v. J. I. Mitrovich Bldg. Co., 59.)
2. **EXECUTION AND FILING OF BOND—FRAUD—PRESUMPTION—PLEADING.**—Where it is alleged in one of the complaints in such actions that a bond was duly made and executed for the purpose of complying with the laws of the state of California, it is to be presumed that the defendants therein did not commit a fraud by filing a "straw" bond. The presumption is always against fraud. It can be put in issue only by direct and positive allegations and must be proved. (Id.)
3. **RIGHT OF LIEN CLAIMANT TO FORECLOSURE—LIABILITY OF OWNER.** When no bond has been filed with good and sufficient sureties in compliance with section 1183 of the Code of Civil Procedure,



**MECHANICS' LIENS (Continued).**

the lien claimant is entitled to a judgment to foreclose his lien upon the land of the owner, irrespective of the amount due from the owner to the contractor; but where such a bond is filed and it is equitable to do so, the court must restrict recovery from the owner to the aggregate amount due from the owner to the contractor. (Id.)

4. **RIGHT TO FORECLOSURE UPON PROPERTY OF OWNER—PLEADING.**—In order to entitle the lien claimant to a foreclosure upon the property of the owner irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of section 1183 of the Code of Civil Procedure with reference to the execution and filing of a bond have not been met. (Id.)
5. **VALIDITY OF BOND—INCONSISTENT POSITIONS OF LIEN CLAIMANT.**—In an action by a lien claimant to foreclose a mechanic's lien and for a deficiency judgment against the contractor and the sureties upon his bond, the plaintiff cannot denounce the bond as void and claim the right of foreclosure upon the property of the owner, and at the same time demand enforcement of the provisions of the bond that are favorable to him. (Id.)
6. **FILING OF BOND FOR RECORD—COMPLIANCE WITH CODE SECTION.**—Section 1183 of the Code of Civil Procedure does not require that either the owner or the contractor shall personally file the bond for record. Filing for record by the architect for the owner is sufficient. (Id.)
7. **WORK ON BUILDING—TIME OF CESSATION—PAINTING OF WINDOW-SILLS PROPERLY OVERLOOKED.**—The painting of window-sills under the direction of the architect to protect them from cracking in the sun, if trivial in amount and not done on the contract, nor by the contractor, is properly overlooked by the court in determining when work on the building ceased. (Hubbard v. Jurian, 543.)
8. **EQUITABLE GARNISHMENT BY GIVING OF STOP NOTICE—MONEY AFFECTED.**—The equitable garnishment which is occasioned by the giving of a stop notice under section 1184 of the Code of Civil Procedure attaches only to such sum as might be payable to the contractor after the extinguishment of liens. (Id.)

**MEDICAL PRACTICE ACT.**

1. **SUFFICIENCY OF TITLE.**—The title of the State Medical Practice Act, approved June 2, 1913 (Stats. 1913, p. 772), is sufficiently comprehensive to include the matters contained in section 17 thereof. (People v. Wah Hing, 327.)
2. **VIOLATION OF SECTION 17—SUFFICIENCY OF INFORMATION.**—An information which alleges that the defendant at a given time and place "did then and there willfully and unlawfully practice, attempt to practice and advertise and hold himself out as practicing

**MEDICAL PRACTICE ACT (Continued).**

a system or mode of treating the sick and afflicted in the State of California, without having at the time of so doing a valid unrevoked certificate from the State Board of Medical Examiners of the State of California," sufficiently charges a violation of section 17 of the State Medical Practice Act. (Id.)

3. **CONVICTION OF VIOLATION OF ACT—SUFFICIENCY OF EVIDENCE.**—In this prosecution for a violation of section 17 of the State Medical Practice Act, in which the defendant was tried and convicted, the evidence was sufficient to justify the verdict. (Id.)
4. **POSSESSION OF CERTIFICATE—BURDEN OF PROOF.**—In a prosecution for a violation of section 17 of the State Medical Practice Act, the burden is on the defendant to prove that at the time charged in the information he had a valid, unrevoked certificate from the state board of medical examiners; and where such proof is not offered, it must be taken as true that he had not procured a certificate to practice medicine. (Id.)

**MINORS.** See Parent and Child, 1.

**MISCONDUCT.** See Negligence, 11.

**MISREPRESENTATIONS.** See Husband and Wife, 5; Vendor and Vendee, 7.

**MISTAKE.** See Judgments, 4, 5; New Trial, 1; Promissory Notes, 9, 10; Quieting Title, 4.

**MORTGAGES.**

1. **PARTIAL DESTRUCTION OF PROPERTY—JUDGMENT AGAINST TORT-FEASOR—LIABILITY FOR MORTGAGE INDEBTEDNESS.**—Where mortgaged real property is partially destroyed by the tortious act of a third party, the mortgagee, in an action to foreclose the mortgage, is entitled to have the tort-feasor, against whom a judgment has been secured by the owner, joined with the owner as a party defendant and to have included in the decree a provision that in the event the proceeds from the sale of the real property is insufficient to satisfy the mortgage indebtedness, the tort-feasor shall pay such deficiency out of the judgment obtained against it by the owner. (Los Angeles T. & S. Bk. v. Bortenstein, 421.)
2. **AWARD OF DAMAGES TO OWNER—SUBSTITUTION FOR MORTGAGED PREMISES—EQUITY.**—In such a case, the judgment against the tort-feasor is for the injury to the mortgaged premises and, in equity, the money recovered because of such injury must be treated as the mortgaged premises, and not merely as the interest of the owner therein, notwithstanding the action against such tort-feasor is by the owner alone and the money is awarded to him. (Id.)

**MORTGAGES (Continued).**

3. **ACTION TO FORECLOSE—DELIVERY OF NOTE AND MORTGAGE BY ASSIGNEE TO PAYEE—CONFLICTING EVIDENCE—FINDING—APPEAL.**—In an action to foreclose a mortgage, a finding of the trial court that after the payee of the note had executed an assignment of the note and mortgage on a separate paper, the assignee under such assignment voluntarily redelivered the note and mortgage to the payee, if based upon conflicting evidence, is conclusive on the appellate court. (*Security Mortgage Co. v. Delfs*, 599.)
4. **REDELIVERY OF NOTE AND MORTGAGE BY ASSIGNEE TO PAYEE—SUBSEQUENT ASSIGNMENT TO ANOTHER FOR VALUE—WANT OF NOTICE—ESTOPPEL.**—Where, after a note and mortgage are assigned on a separate paper by the payee to a bank as security for the payment of an independent debt, the bank voluntarily delivers the note and mortgage to the payee thereof without any notation thereon showing its claim, and without recording the assignment to it or giving notice to the mortgagors of such assignment, and thereafter the payee assigns the note and mortgage to another, who takes the same prior to the recordation of the assignment to the bank, in good faith, for value, and without any notice of any prior claim, the bank is estopped from claiming ownership as against such subsequent assignee. (*Id.*)
5. **ORDER OF RECORDATION OF ASSIGNMENTS IMMATERIAL—CONSTRUCTION OF CODE.**—In such case, the equities of the respective assignees are not rendered equal because the subsequent assignee does not record his assignment until after the holder of the first assignment has recorded his, where the latter is not injured by the failure to record such subsequent assignment; neither is such subsequent assignment void under section 1214 of the Civil Code, as against the assignee under the prior assignment, who places his assignment of record first, as the latter is not a "subsequent purchaser" within the meaning of that section. (*Id.*)
6. **ASSIGNMENT TO TWO INNOCENT PARTIES—PRIORITY OF TRANSFER AND RECORDATION—NEGLIGENCE—FRAUD—RIGHTS OF PARTIES.** When a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation or other notice of either assignment, as between the two innocent parties the priority of the transfer and of the recordation or other notice is important only when the equities are equal; but where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer. (*Id.*)
7. **MORTGAGEE IN POSSESSION—STATUTE OF LIMITATIONS—PAYMENT OF MORTGAGE DEBT.**—Where the mortgagee under a first mortgage, prior to such mortgage being barred by the statute of limitations

**MORTGAGES (Continued).**

but after a second mortgage on the property has been executed in favor of the mortgagor under the first mortgage, acquires the legal title to the mortgaged premises and enters into possession thereof, he cannot be ejected or interfered with in any manner by the mortgagor until the mortgage debt is paid, even though his mortgage has become barred. (Craig v. Gomes, 728.)

See Claim and Delivery, 3, 5; Deposit, 1; Guaranty, 2; Homesteads, 3; Liens, 1; Promissory Notes, 11; Quieting Title, 2, 3; Security, 1.

**MOTIONS.** See Default, 3; Judgments, 24, 25.

**MOTIVE.** See Criminal Law, 1; Homesteads, 1, 2; Slander, 1, 2.

**MOTOR VEHICLE ACT.** See Negligence, 10.

**MUNICIPAL CORPORATIONS.** See License Taxes, 1; Ordinances, 1; Pensions, 1, 2; Poison Act, 1; Police Court, 1; Police Officers, 1.

**MURDER.** See Criminal Law, 1-4.

**NAMES.** See Husband and Wife, 14; Libel, 16; Partnership, 4, 5; Supplementary Proceedings, 1.

**NEGLIGENCE.**

1. **CONSTRUCTION OF BRIDGE—OBSTRUCTION OF STORM WATERS—ACTION FOR DAMAGES—EVIDENCE—STATEMENT OF DEFENDANTS' EMPLOYEE.**—In an action for damages for injury to land caused by the obstruction of storm waters by a bridge alleged to have been negligently constructed and maintained by the defendants, the testimony of a witness that an employee of the defendants, who was not in any way connected with the defendants at the time the bridge was constructed years before but who examined the bridge some time after the overflow, stated that the bridge was not properly constructed because of the piling being driven diagonally across the stream, is inadmissible as a declaration by the employee against his employer, the conversation in question not being part of the *res gestae*. (Brush v. Southern Pac. Co., 54.)
2. **CONSEQUENTIAL INJURY—NATURE OF ACTION—STATUTE OF LIMITATIONS.**—An action for damages for injury to land caused by the obstruction of storm waters, as the result of the construction of a bridge, is not for a trespass upon real property, but is in the nature of an action upon the case at common law for a consequential injury, which is not barred by the statute of limita-

NEGLIGENCE (Continued).

tions if commenced within two years after the receipt of such injury. (Id.)

3. **DESTRUCTION OF GRAIN BY FIRE—EVIDENCE—PRIMA FACIE CASE—REBUTTAL.**—In this action for damages for the destruction by fire of certain grain belonging to plaintiff, the evidence introduced by plaintiff made out such a *prima facie* case as called upon the defendants to rebut the necessary inferences arising from the testimony, and the motion of the defendants for a nonsuit was properly denied. (*Dibble v. San Joaquin L. & P. Corp.*, 112.)
4. **CONNECTION OF WORKMEN WITH DEFENDANTS' BUSINESS—PRIMA FACIE SHOWING OF PRINCIPAL AND AGENT.**—The plaintiff, in such action, having shown that the men who were responsible for the starting of the fire appeared at the time to be engaged in some kind of work connected with the business of the defendants, made a *prima facie* showing of the existence of the relationship of principal and agent between the corporation defendants and the workmen, which, in the absence of evidence to the contrary, was ample to support the findings of the trial court that such relation existed at the time of the fire. (Id.)
5. **ORIGIN OF FIRE—INFERENCE FROM EVIDENCE.**—While there was no direct evidence in this case as to the origin of the fire, the trial court had the right to make any logical, reasonable deduction, which the admitted facts and the undisputed testimony permitted, and it was a fair inference that the flames which destroyed plaintiff's property were communicated thereto by the fire which originated on the right of way of defendants, and which had its origin in one or the other of the instrumentalities used by defendants' employees in their work. (Id.)
6. **FAILURE TO EXTINGUISH FIRE.**—The employees of the defendants were guilty of gross carelessness in not properly controlling and extinguishing the fire when their attention was directed to the probabilities of its spreading, it having at the time been burning in tall, dry grass which extended to plaintiff's field. (Id.)
7. **PRIMA FACIE PRESUMPTION—BURDEN OF PROOF.**—The presumption which in certain cases is available to a plaintiff as showing, *prima facie*, negligence on the part of a defendant, is one which in its practicable application results only in shifting the burden of proof, and in cases where the bare circumstances of an occurrence, as to the cause of which negligence is charged, are shown, if the defendant by uncontradicted evidence clearly shows that he has used the degree of care required of him in the circumstances, the plaintiff must fail of recovery. (*Stott v. Southern Sierras Power Co.*, 242.)

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**NEGLIGENCE (Continued).**

8. **ELECTRIC CORPORATIONS—DEGREE OF CARE REQUIRED.**—Persons engaged in the business of supplying electric current, the agency involved being a dangerous one, are required to use great care to see that injury to others is not caused thereby. (Id.)
9. **EXERCISE OF PROPER CARE—WHEN QUESTION OF LAW—CASE AT BAR—EVIDENCE.**—The question whether a company engaged in the business of supplying electric current discharged its obligation by properly constructing, installing, and inspecting its power line becomes a matter of law wherever the facts are clearly settled and the course which common prudence dictates can be readily discerned; and in this action for damages suffered by plaintiff because of the burning of certain hay, the fire having been caused by a "short" due to the cracking or puncturing of certain insulators on defendant's power line, the evidence was clear and satisfactory to the point that defendant had used that degree of care required of it in the circumstances. (Id.)
10. **AUTOMOBILE COLLISION—VIOLATION OF MOTOR VEHICLE ACT—EFFICIENT CAUSE OF ACCIDENT.**—In an action to recover compensation for damage to plaintiff's automobile as the result of a collision between it and that of defendants, the act of the plaintiff in "cutting the corner" in turning into an intersecting street, in violation of the provisions of the Motor Vehicle Act, will not bar his recovery, unless it is made to appear that such negligence was a part of the efficient cause of the collision. (Wilkinson v. Rober, 872.)
11. **ACTION FOR DAMAGES—MISCONDUCT OF PLAINTIFF'S COUNSEL—RECORD.**—On this appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries, the record did not support the contention of appellant that counsel for plaintiff were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of appellant against claims for damages, the only time counsel for plaintiff referred to that fact the court having instructed the jury to disregard the remarks of counsel for plaintiff in that respect. (Williamson v. Hardy, 877.)
12. **PERSONAL OBSERVATION OF PLAINTIFF FOLLOWING ACCIDENT—EVIDENCE.**—In this action for damages for personal injuries sustained by plaintiff through having slipped and fallen upon the floor of the defendant's meat market, the court properly permitted witnesses who were called by the plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and half or so thereafter. (Id.)
13. **CAUSE OF ACCIDENT—TESTIMONY OF PLAINTIFF—PROPER SUBMISSION TO JURY.**—In such action, the plaintiff having testified

NEGLIGENCE (Continued).

positively that she slipped and fell upon the floor of the defendant's meat market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, it was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont and were required to walk while making their purchases therein, and the court properly denied the defendant's request for a directed verdict. (Id.)

14. **RIGHT OF WAY AT STREET INTERSECTION—VIOLATION OF ORDINANCE—CONTRIBUTORY NEGLIGENCE.**—Where the traffic ordinance of a city requires that "The drivers of all vehicles must look out for and give right of way to vehicles approaching simultaneously from their right at street intersection," the driver of a vehicle who fails to yield the right of way to the driver of another vehicle approaching simultaneously from his right at a street intersection, as the result of which a collision occurs and the former is injured, is guilty of negligence as a matter of law directly contributing to his injury which bars recovery, notwithstanding the driver of the other car is guilty of negligence *per se* in approaching the intersection at an excessive rate of speed. (Kinney v. King, 390.)
15. **AUTOMOBILE COLLISION—CAUSE OF ACTION—SIMULTANEOUS NEGLIGENCE OF PLAINTIFFS AND DEFENDANTS—EVIDENCE—FINDING—APPEAL.**—In an action for damages for personal injuries received in a collision between plaintiffs' and defendants' automobiles while crossing a bridge, if the evidence is such that the jury cannot determine which of the two was to blame for the collision, in other words, whether it was the defendant's negligence or that of the plaintiffs or the contemporaneous negligence of both that was the proximate cause of the injury, the appellate court cannot hold, as a matter of law, that the finding of the jury that both the plaintiffs and the defendant were equally at fault, and that the accident would not have occurred but for the simultaneous negligence of both, is not supported by the evidence. (Grover v. Morrison, 521.)
16. **POSITION OF MACHINES AFTER COLLISION—PROPRIETY OF QUESTIONS AND STATEMENT BY TRIAL JUDGE.**—In such action, a witness for plaintiffs having testified that he saw evidence of a collision at a specified distance from the end of the bridge, the distance stated being at variance with that stated by other witnesses, the court did not commit error in asking him whether he measured the distance or was just guessing at it; neither did the court, in ruling on an objection interposed to a question propounded to such witness as whether he saw any evidence of collision, commit error prejudicial to plaintiffs in suggesting that the machine of plain-

## NEGLIGENCE (Continued).

tiffs had been moved from the position in which it was left as the result of the collision, where, after counsel for plaintiffs stated there was no testimony that the machine had been moved, the court remarked that the question objected to had no application or reference to plaintiffs' machine. (Id.)

17. **CONDITION OF WITNESSES AS TO SOBRIETY—DENIAL OF CROSS-EXAMINATION—ABSENCE OF PREJUDICE.**—In such action, while the ruling of the court denying plaintiffs the right to cross-examine one of defendant's witnesses as to whether or not the latter was drunk on the day of the accident and for months previous thereto, such witness having testified that a certain witness of plaintiffs was drunk on the day of the accident, was erroneous, it was not prejudicial to the rights of plaintiffs where the testimony of their witness was merely corroborative of the testimony given by them and a different result would not have followed from the allowance of such cross-examination. (Id.)
18. **RIGHT OF RECOVERY—DAMAGES—INSTRUCTIONS.**—In such action, instructions that if, when the collision occurred, both parties were driving on the center line of the bridge, then both were equally guilty of negligence contemporaneously occurring and that in that case neither was entitled to a verdict for damages as against the other, that if neither party was negligent, or if both parties were equally guilty of negligence, simultaneously committed, neither was entitled to recover against the other, and that the jury were not legally authorized to award damages to either party if the liability of neither was established by the evidence merely because the court explained to them the rule as to the measure of damages in such a case, correctly state the law. (Id.)
19. **FORM OF VERDICT—SUFFICIENCY OF.**—In such action, the jury having found in effect against the plaintiffs on their complaint and against the defendant on his cross-complaint, its verdict "that neither party are entitled to damages," although a little out of shape in its grammatical construction, is in language sufficiently clear and explicit to put beyond doubt the proposition that the result reached by the jury was that neither of the parties to the action was entitled to recover against the other. (Id.)
20. **ACTION FOR DAMAGES—PERSONAL INJURIES—VERDICT NOT EXCESSIVE.**—In this action for damages for personal injuries sustained by plaintiff when an automobile bus owned and operated by the defendant, and in which plaintiff was riding as a passenger, overturned, in view of the injuries plaintiff received and the damage done to his clothes, the nervous shock suffered by him, the time he spent in the hospital, then in bed at his home, and then during which he was unable to resume his work and the hospital and doctor's bills incurred, the amount of damages allowed was not so



NEGLIGENCE (Continued).

grossly excessive as to call for the interference of an appellate tribunal. (Williams v. A. R. G. Bus Co., 568.)

21. **EXCESSIVE DAMAGES—POWER OF APPELLATE COURT.**—The power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. (Id.)
22. **PASSION OR PREJUDICE—DISREGARD OF INSTRUCTIONS—EXCESSIVE VERDICT—REMEDY—PROCEDURE.**—In an action for damages for personal injuries, if the defendant considers the verdict the result of passion or prejudice, or a disregard of the instructions of the court, it cannot raise the point for the first time on appeal, but must bring this matter before the attention of the trial court on a motion for a new trial. (Id.)
23. **PAIN AND SUFFERING—ADMISSIBILITY OF STATEMENTS BY PLAINTIFF.**—In an action for damages for personal injuries sustained by plaintiff when an automobile bus owned and operated by the defendant, in which plaintiff was riding as a passenger, overturned, testimony by the wife and the mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering is properly admitted. (Id.)
24. **DOCTRINE OF RESPONDEAT SUPERIOR—WHEN APPLICABLE.**—The doctrine of *respondere superior* cannot be invoked to hold the master liable for injury caused by the negligent act of a servant unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto. (Hall v. Puente Oil Co., 611.)
25. **AUTOMOBILE ACCIDENT—SCOPE OF EMPLOYMENT—EVIDENCE.**—In this action against an oil company and one of its employees to recover damages for personal injuries sustained by plaintiff through having been struck by an automobile owned by the company and driven by such employee, the evidence showed that the accident happened after the duties of the employee to the employer had ended for the day and at a time when such employee was engaged in a mission the purpose of which was his own pleasure and which could have no possible connection with the duties which he owed to his employer. (Id.)
26. **CONSENT OF EMPLOYER TO USE OF AUTOMOBILE—LIABILITY FOR DAMAGES.**—The fact that the employee was using the automobile of his employer for his own purposes with the employer's consent would not render the latter liable for injuries resulting from the negligence of such employee. (Id.)
27. **EXTENT OF INJURY—CAUSE—EVIDENCE—FINDINGS.**—In this action against an oil company and one of its employees to recover

**NEGLECTENCE (Continued).**

damages for personal injuries sustained by plaintiff through having been struck by an automobile owned by the company and driven by such employee, the evidence was sufficient to support the findings of the trial court as to the extent of plaintiff's injury and that such injury was due to the negligence of the employee. (Id.)

28. **SETTLEMENT AGREEMENT WITH PLAINTIFF—EVIDENCE—FINDING.**—Notwithstanding that in a criminal proceeding growing out of the negligent act of such employee the judge had told him that he would have to make some reparation for the injury sustained by plaintiff and left the matter in the hands of the probation officer, who concluded that such employee could pay a given sum each month, which sum was paid for four months, the trial court, in such action, properly found that the parties had not entered into an agreement whereby such employee agreed to pay, and plaintiff agreed to accept, said sum per month for a given number of months in full settlement of his damages. (Id.)
29. **ACTION FOR DAMAGES FOR DEATH—ABSENCE OF CONTRIBUTORY NEGLIGENCE—EVIDENCE—FINDING—APPEAL.**—In an action for damages for death caused by the deceased having been struck by an automobile, a finding by the trial court that the deceased was not negligent, if supported by sufficient evidence, will not be disturbed on appeal. (*Koehl v. Carpenter*, 642.)
30. **CROSSING OF STREET BY PEDESTRIAN—CARE REQUIRED.**—There is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, but the question of negligence, under the usual rule of ordinary care that devolves upon foot-travelers, must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers. (Id.)
31. **DUTY OF MOTORISTS TRAILING OR PASSING CARS—ABILITY TO COMPLY WITH MUNICIPAL ORDINANCE.**—In view of the obvious danger of passing street-cars when they stop for the accommodation of passengers, it behooves motorists neither to trail cars so closely that they cannot comply with a municipal ordinance which requires them to stop at least ten feet in the rear of such street-car, nor to attempt to pass a street-car at a regular stopping point until they are sure that there will be no stop. (Id.)
32. **MEASURE OF DAMAGES—PROVINCE OF TRIAL COURT—APPEAL.**—The amount of damages to be allowed the plaintiffs for the death of their daughter due to the negligence of the defendants is a matter peculiarly within the province of the trial court, and its action will not be disturbed on appeal unless the amount is so disproportionate to the injury as at first glance to shock the conscience. (Id.)

NEGLIGENCE (Continued).

33. **FUNERAL EXPENSES—PLEADING—FINDING—EVIDENCE.**—In such action, an allegation that certain indebtedness covering the cost of burial had been incurred is sufficient to support a finding that plaintiffs were damaged to that amount; and the defendants will not be heard to contend on appeal that the damages should not have included that amount because the bill was not paid by either of the plaintiffs, where the colloquy between counsel at the time the bill was offered in evidence was sufficient to sustain the implied finding that, though the bill was made out to the brother of the deceased, the expense was incurred by plaintiffs, and counsel for defendant stated at that time that he would not raise any objection to the bill. (Id.)
34. **COLLISION BETWEEN STREET-CAR AND PEDESTRIAN—RES IPSA LOQUITUR.**—The doctrine of *res ipsa loquitur* has no just or proper application to the case of a collision between a street-car and a pedestrian on the street. (Ross v. Railways Co., 753.)
35. **RECIPROCAL DUTIES OF STREET-CAR COMPANY AND PEDESTRIANS—BREACH—RESPONSIBILITY.**—The duties of a street-car company and its motorman upon approaching an intersecting street and of a pedestrian about to cross the tracks at such intersection are reciprocal, and each is required to approach the crossing with due regard for the rights of the other, and if either fails to observe the care required, it is negligence for which the guilty party is responsible. (Id.)
36. **CROSSING OF HIGHWAY IN FRONT OF APPROACHING CAR—PROPRIETY OF CONDUCT—QUESTION FOR JURY.**—If, in view of his distance from an approaching street-car, the rate of its speed and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury. (Id.)
37. **CONNECTION BETWEEN NEGLIGENCE AND INJURY—PROOF BY CIRCUMSTANTIAL EVIDENCE.**—While, by merely proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out, it is not necessary that an eyewitness be produced to testify directly to the fact, but the connection may be made by circumstantial evidence in the same way that any other fact can be so proved. (Id.)
38. **EXERCISE OF ORDINARY CARE BY PEDESTRIAN—PRESUMPTION.**—In the absence of evidence to the contrary, it will be presumed that a pedestrian who was killed by a street-car while attempting to cross the tracks at a crossing was exercising due and proper care for the protection of his life. (Id.)
39. **CAUSE OF ACCIDENT—DOCTRINE OF PROBABILITIES—APPLICATION OF RULE.**—The principle of law that if the probabilities are

## NEGLIGENCE (Continued).

equally balanced that the accident was produced by a cause for which the defendant is responsible, or by one for which he is not, the plaintiff must fail, is more applicable as a rule to guide the jury in its deliberations upon the facts than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence. (Id.)

40. **PRACTICE OF STOPPING CARS AT CROSSING—EFFECT OF DEPARTURE FROM.**—The settled practice of stopping a street-car at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted. (Id.)
41. **EXERCISE OF PROPER CARE BY MOTORMAN—BELIEF OF PEDESTRIAN.**—A pedestrian about to cross a street-car track is entitled to act upon the belief that the operator of an approaching street-car will, upon his part, obey the rules of the company, and run the car at the speed which is customary at that particular place, and that he will give the usual warnings and signals, and take the usual precautions to avoid injury to others. (Id.)
42. **FAILURE TO FOLLOW SETTLED PRACTICE—DUTY TO ASSUME THAT PEDESTRIAN MIGHT ATTEMPT TO CROSS TRACKS—QUESTION FOR JURY.**—Under the circumstances of this case, in which a boy of the age of sixteen years was killed by a street-car which had failed to stop at a crossing, as had been the settled practice of the company, it should have been left to the jury to say whether or not the manner in which the motorman operated the car at the crossing was such that he should have assumed that persons might ignorantly attempt to cross in front so near the approaching car as to make a collision probable. (Id.)
43. **DEATH OF MINOR SON—ACTION FOR DAMAGES—HIDING OF SHOE BY MOTORMAN—EVIDENCE OF ADMISSIBLE.**—In this action for damages for the death of a minor son through having been struck and run over by a street-car of the defendant company, the accident having occurred at an early hour of the morning and there having been no eye-witnesses, the trial court committed error in excluding from the jury testimony of the motorman, a codefendant in the action, showing that after the car reached the car-barn a shoe, admitted to be the shoe of the deceased, was found back of the pony truck of the car, that he knew "something had happened," and that he put the shoe in a garbage can used by the city, where it was out of sight. (Id.)
44. **CONCEALING OF PERTINENT EVIDENCE—TESTIMONY OF ADMISSIBLE—ADMISSIONS.**—Testimony showing, or tending to show, an attempt on the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court

## NEGLIGENCE (Continued).

or jury, is competent and proper. Such efforts may be shown, not as part of the *res gestae*, but in the nature of an admission, the effect of which is a matter for the consideration of the jury. (Id.)

See Attorney at Law, 1; Common Carriers, 4; Equity, 1; Mortgages, 6; Property, 2; Workmen's Compensation Act, 5, 8, 9.

## NEGOTIABLE INSTRUMENTS.

1. ASSIGNMENT BEFORE MATURITY AS COLLATERAL SECURITY—CONSIDERATION—DEFENSES.—An assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser thereof under the law-merchant against defenses to the note of which he has no notice at the time of the indorsement. (Hunt v. Glassell, 774.)
2. INDORSEMENT AFTER MATURITY—DEFENSES AVAILABLE.—The maker of a note sued on by an indorsee after maturity may prove anything in defense which goes to destroy or satisfy the note,—anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes an admission or affirmation of the plaintiff's right of action and his title to the money he seeks to recover, but which seeks to defeat the recovery by establishing liability on his part. Within this class of defenses are fraud, mistake, want or failure of consideration, release, or anything else which goes to show that he ought never be compelled to pay the note to the person to whom it was originally given, or to any person who had held it after maturity, and before it came into the hands of the plaintiff. (Id.)
3. SALE BY BANKRUPT COURT—WANT OF POSSESSION—DEFENSES OF MAKER.—A bankruptcy court possesses no such power that it can, by a pretended sale of a purported right to a promissory note which it had never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before the payee named therein had been adjudged a bankrupt, deprive the maker thereof of such defenses thereto as he might interpose at the time it was so delivered as such collateral security. (Id.)

See Promissory Notes, 11.

## NEW TRIAL.

1. OMISSION TO ENTER ORDER—ENTRY NUNC PRO TUNC.—Where an order is made submitting a motion for a new trial but, through inadvertence, such order is not entered, the court has the power, at a later date, to order that the entry of the order submitting such motion be then entered *nunc pro tunc*, as of the previous date. (Dolan v. Superior Court, 235.)

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**NEW TRIAL (Continued).**

2. **DENIAL BY LAPSE OF TIME—SUBSEQUENT ORDER VOID.**—The failure of the court to determine a motion for a new trial within three months after notice of entry of judgment has the effect of a denial of the motion, and an order of the court thereafter made purporting to grant a new trial on certain issues is beyond the jurisdiction of the court and void. (Id.)
3. **NEWLY DISCOVERED EVIDENCE—DENIAL OF CONTINUANCE.**—A motion for a new trial on the ground of newly discovered evidence and of error of the court in refusing to grant a continuance that certain evidence might be secured is properly denied, where application for such continuance was not made during the trial of the case and no facts are stated in the affidavit in support of such motion showing the discovery of any new evidence which was not known and accessible to defendant at the time of the trial. (In re Cruickshank, 496.)
4. **INEFFICIENCY OF COUNSEL—OMISSION TO PROTECT DEFENDANT'S RIGHTS.**—In the absence of a duly authenticated record showing error, the appellate court cannot reverse an order denying a motion for a new trial on the ground that, due to the inefficiency of counsel, defendant omitted the doing of things which he thereafter felt he should have done in protecting his interest at the trial. (Id.)

See Appeal, 3, 4; Negligence, 22; Records, 5.

**NONSUIT.** See Corporations, 4; Negligence, 3.

**NOTICE.** See Appeal, 3, 9, 11; Common Carriers, 2; Contracts, 15, 16; Default, 1, 2; Street Law, 2, 7; Trial, 1, 2; Vendor and Vendee, 8, 9.

**NUISANCES.**

1. **MALICIOUS ERECTION AND MAINTENANCE OF FENCE—EVIDENCE—FINDING.**—In this action, brought by the plaintiff under the provisions of the act of the legislature of May 28, 1913 (Stats. 1913, p. 342), to have a certain fence, wholly erected and maintained upon the premises of the defendant, declared a private nuisance, and removed forthwith, or reduced to a height not exceeding ten feet, the trial court properly concluded from the evidence introduced, and particularly from the circumstances surrounding the erection of the fence, that it unnecessarily exceeded ten feet in height, and was maliciously erected, and so maintained, for the purpose of annoying the plaintiff and his tenants. (Bar Due v. Cox, 713.)
2. **CONSTITUTIONALITY OF ACT OF LEGISLATURE.**—The act of the legislature of May 28, 1913 (Stats. 1913, p. 342), which provides

**NUISANCES (Continued).**

that any fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupants of adjoining property, shall be deemed a private nuisance, for the abatement of which such owner or occupant may enforce the remedies prescribed in the section of the Civil Code, is not unconstitutional. (Id.)

See Red-light Abatement Act, 1, 2, 6.

**NUNC PRO TUNC ORDERS.** See New Trial, 1.

**OAKLAND CHARTER.** See Pensions, 1.

**OBTAINING GOODS BY FALSE PRETENSES.** See Criminal Law, 5.

**OPINION.** See Appeal, 16; Vendor and Vendee, 2-4.

**OPTION.** See Sales, 1.

**ORDERS.** See Contempt, 1; Workmen's Compensation Act, 4-8.

**ORDINANCES.**

1. **MUNICIPAL CORPORATIONS—NATURE OF ORDINANCE—TITLE NOT CONCLUSIVE.**—In determining whether a municipal ordinance is a revenue measure or is regulatory in its nature, and therefore beyond the powers of the municipality, the courts will look to the substantive provisions of the ordinance, the title of the ordinance, even though it contain the word "regulating," not being conclusive. (In re Johnson, 465.)
2. **MARYSVILLE—LICENSE ORDINANCE—REVENUE MEASURE.**—Ordinance No. 188 of the city of Marysville, entitled, "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations," is a revenue measure. (Id.)
3. **VIOLATION OF ORDINANCE—MISDEMEANOR UNDER STATE LAW.**—Section 435 of the Penal Code, which provides that a failure to take out a license when required by a law of this state shall constitute a misdemeanor, covers a violation of such an ordinance, regardless of whether the city had the power to provide that a violation of the ordinance should constitute a misdemeanor. (Id.)
4. **NONPAYMENT OF LICENSE TAX—IMPRISONMENT—CONSTITUTIONAL LAW.**—Imprisonment on conviction for nonpayment of a license tax imposed by a municipal ordinance is not an imprisonment for debt within the meaning of article I of the constitution. (Id.)

See Negligence, 14, 31.

**PARENT AND CHILD.****CAPABILITY OF FATHER TO EXERCISE PROPER CONTROL—EVIDENCE—**

**FINDING.**—On this proceeding to secure an order of the superior court, sitting as a juvenile court, declaring certain minors to be wards of said court, and taking them from the custody and control of their father, although the evidence showed that the grandmother of the children was so situated as to give them better attention and more wholesome surroundings than they were likely to receive under the arrangements made by the father for their care and custody, there was no evidence to support the finding of the court that they had no parent or guardian capable of exercising proper parental control. It is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child. (*In re Gutierrez*, 128.)

**PARTIES.**

**SUIT BY DISTRIBUTEES.**—A final decree of distribution in the estate of the deceased payee named in such note and mortgage having been entered, the absolute right and title thereto was vested in the distributees, and they had the right to bring an action thereon. (*Stoner v. Security Trust Co.*, 216.)

See Appeal, 2, 18; Conversion, 1; Corporations, 4; Mortgages, 1; Quieting Title, 5; Trial, 1; Vendor and Vendee, 9.

**PARTNERSHIP.**

1. **SUIT FOR ACCOUNTING—INTERLOCUTORY JUDGMENT—RIGHT OF APPEAL.**—A judgment in a suit for partnership accounting, which provides that the assets of the partnership be sold by a commissioner and, upon the return of the commissioner and the equal division of the assets between the parties, a final judgment be entered, is, in legal effect, a final judgment from which an appeal will lie. (*Peterson v. Lightfoot*, 646.)
2. **NATURE OF RELATIONSHIP—EVIDENCE—FINDING.**—In such an action, if there is evidence to support the finding of the trial court that the partnership was not one of profits only, such finding is controlling on appeal. (*Id.*)
3. **EQUITABLE JURISDICTION OF COURT.**—A suit for partnership accounting is one addressed to the equitable jurisdiction of the court. (*Id.*)
4. **PARTNERSHIP NAME—WHEN AN ASSET.**—In a suit for partnership accounting, a name which had been used by one of the partners prior to the formation of the partnership, but which was worthless when the partnership was formed, is properly considered as a partnership asset where, after the formation of the partner-



**PARTNERSHIP (Continued).**

ship, it was made valuable by the joint efforts of the partners. (Id.)

5. **SECRET RECORDATION OF NAME BY PARTNER—EFFECT OF.**—The act of the partner who had used such name prior to the formation of the partnership, after the formation of the partnership, but without the knowledge of his copartner, in causing such name to be registered in the office of the Secretary of State in his own name would not cause any diminution of the rights of his copartner. (Id.)

See Attorney at Law, 5.

**PATENTS.**

**HOW ASSIGNED—CONSTRUCTION OF UNITED STATES STATUTE.**—Section 4898 of the Revised Statutes of the United States, providing that an interest in a patent cannot be assigned except by an instrument in writing, has reference solely to patents or an interest therein, and not to an invention which has not been and may never be patented. (*Mosley v. Seely*, 608.)

See Contracts, 20, 21.

**PAYMENT.** See Accounts, 3, 5; Checks, 1; Claim and Delivery, 5; Fire Insurance, 3; Promissory Notes, 8-10.

**PENSIONS.**

1. **MUNICIPAL CORPORATIONS—OAKLAND—PENSION OF RETIRED CORPORAL BASIS OF COMPUTATION.**—Under section 95 of the charter of the city of Oakland, a retired corporal of police, who has held that rank one year prior to his retirement, is entitled to an annual pension equal to one-half the salary he would receive as a corporal if he were restored to actual service, and not one-half the salary he received one year prior to his retirement. (*Rumetsch v. Davis*, 512.)
2. **MUNICIPAL CORPORATIONS—SAN FRANCISCO—POLICE PENSION FUND—VESTED RIGHTS.**—Judgment affirmed on the authority of *Sheehan v. Board of Police Commissioners*, ante, p. 29, [190 Pac. 51]. (*Sheehan v. Police Commrs.*, 793.)

See Police Officers, 1.

**PERFORMANCE.** See Contracts, 12, 13.

**PERJURY.** See Criminal Law, 10.

**PERSONAL INJURIES.** See Negligence.

## PLACE OF TRIAL.

1. **CHANGE—LOSS OF JURISDICTION.**—When the superior court of the county in which an action is pending makes its order transferring the cause to the superior court of another county, it thereby loses, for all purposes, all jurisdiction of the action. (*Searey v. Superior Court*, 124.)
2. **ACTION FOR DIVORCE—CHANGE—APPEAL—POWER TO ORDER ADDITIONAL ALIMONY.**—After the superior court of the county in which an action for divorce is pending makes its order transferring the cause to the superior court of another county, it has no power to order additional alimony and counsel fees, notwithstanding an appeal is taken from the order changing the place of trial. (*Id.*)

See Appeal, 8, 10.

## PLEADING.

1. **AMENDMENTS DURING TRIAL—DISCRETION—APPEAL.**—The allowance of amendments during the trial is a matter largely in the discretion of the trial court, and the ruling of the trial court will not be disturbed unless an abuse of discretion is clearly shown. (*Milliken v. Valencia*, 16.)
2. **AMENDMENT ALLEGING TRUST RELATIONSHIP—DENIAL OF LEAVE.**—Where the pleadings in an action to quiet title consist merely of an allegation of ownership by plaintiff and a denial by the defendants, the sheriff, and a judgment creditor of a brother of plaintiff of such ownership, accompanied by an allegation that said brother of plaintiff is the owner of an undivided one-half interest in the property, it is not error to refuse the defendants leave to amend during the trial so as to permit the introduction of proof that plaintiff holds an undivided one-half interest in the property in trust for said brother. (*Id.*)
3. **FRAUD—UNVERIFIED ANSWER TO VERIFIED COMPLAINT—ADMISSIONS.**—In an action by a wife against her husband and another to recover certain real property which the defendant husband by fraudulent practices induced plaintiff to convey to him and which he in turn conveyed to his codefendant, who, it is alleged was not a *bona fide* purchaser, without notice, if the complaint is verified, an unverified answer by the defendant husband constitutes an admission on his part of the fraud practiced by him upon plaintiff. (*Patterson v. Blackburn*, 362.)
4. **SUPPLEMENTAL COMPLAINT—SERVICE OF SUMMONS.**—Where, in an action upon a promissory note, following the death of the maker a supplemental complaint is filed, in which the substance of the original complaint is incorporated, together with appropriate allegations showing the death of the maker of the note, the appointment of the executor, and the presentation of a claim, and sum-

**PLEADING (Continued).**

mons is issued upon such supplemental complaint and served upon the executor, there is no necessity or requirement that such executor should be served with the summons issued on the original complaint. (*Title Ins. etc. Co. v. Gould*, 533.)

5. **CASE PRESENTED—RIGHT OF RECOVERY.**—A plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs. (*McCord v. Martin*, 717.)
6. **ADMISSION OF EVIDENCE WITHOUT OBJECTION—WAIVER OF OBJECTION THAT NO ISSUE PRESENTED.**—Where a cause is tried upon the theory that a certain fact is in issue and evidence thereon is received without objection, it is too late thereafter to complain that no such issue was presented. (*Id.*)

See Accounts, 3; Automobile Insurance, 3-5; Bailments, 2; Claim and Delivery, 2, 7, 8; Contracts, 10, 23; Conversion, 1, 3; Criminal Law, 25, 26, 28; Damages, 3; Default, 3; Divorce, 1, 4, 5; Estoppel, 1, 2; Insolvency, 2, 3; Irrigation, 2; Judgments, 9, 21; Leases, 5; Mechanics' Liens, 1, 2, 4; Medical Practice Act, 2; Negligence, 33; Promissory Notes, 2, 4, 9, 12; Quieting Title, 1; Supplemental Proceedings, 2; Trade Names, 1; Vendor and Vendee, 5.

**PLEDGES.**

1. **PLEDGE OF SECURITIES—RIGHT TO PERSONAL JUDGMENT.**—In the absence of statute of stipulation to the contrary, the possession of pledged property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledge. (*Stern v. McDonald*, 79.)
2. **CONSIGNMENT OF GOODS TO FACTOR—RIGHTS OF BONA FIDE PLEDGEE FOR VALUE.**—Where goods are consigned directly to a factor, the bill of lading designating him as the consignee, and upon the arrival of the goods and his securing possession of them they are pledged to one who receives them in good faith, in the ordinary course of business, and for value, the real owner cannot set up his title to defeat such pledge, notwithstanding the factor obtained possession of the goods from the carrier without showing a bill of lading and going through the usual course of business and the pledgee did not call for the bill of lading or some indicia of ownership in taking the goods as a pledge, but accepted the factor's statement that he was the owner. (*Fairmont C. Co. v. Los Angeles Ice Co.*, 103.)
3. **AGREEMENT OF PLEDGEEHOLDER TO HOLD PROPERTY—ESTOPPEL.**—In this action to establish a first lien in plaintiff upon certain automobile material which, notwithstanding a prior pledge thereof, was pledged to plaintiff as security for a loan, it having been

**PLEDGES (Continued).**

represented to plaintiff that the property had been freed from all prior liens and the corporation pledgeholder, by its president, having agreed to honor only such orders with reference to the delivery of the material as might be issued by plaintiff, the trial court properly held that the corporation pledgeholder was estopped to deny the binding character of the contract made by its president to hold the property subject to plaintiff's orders, and that such president, as an individual, to whom the first note and the interest of the payee therein in the pledge of the security was assigned, and who, though an agent or employee, had purchased the property on a sale thereof to satisfy such first pledge, was estopped to deny that he was bound by the contract of the pledgeholder to hold the property unconditionally for plaintiff. (*Mayr v. Reynolds*, 168.)

**POISON ACT.**

1. **DISPOSITION OF FINES—LAW APPLICABLE.**—The state Poison Act, being a general statute, enacted by the legislature, and the offenses defined therein being state offenses—in other words, offenses which, in their commission or punishment, are not limited to the confines of any municipality—provision therein relating to the disposition of fines collected under its provisions and not the provision contained in a freeholders' charter of a given municipality, is of superior effect and must control. (*People v. City of San Bernardino*, 232.)
2. **SUFFICIENCY OF TITLE.**—An act entitled, "An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof," satisfies the requirement of the constitution as to its title. (*Id.*)
3. **ACTION TO RECOVER PERCENTAGE OF FINES—NATURE OF—STATUTE OF LIMITATIONS.**—An action by the state against a city to recover seventy-five per cent of certain fines imposed upon defendants in the police courts of that city after conviction therein of violations of the state Poison Act is one upon a liability created by statute, as to which the three-year statute of limitations is applicable. (*Id.*)

**POLICE COURTS.**

**MUNICIPAL CORPORATIONS—SACRAMENTO—JURISDICTION AS TO MISDEMEANORS.**—The jurisdiction of the police court of the city of Sacramento, as to misdemeanor committed under the general laws of the state, is concurrent with that of the justices' courts of the county of Sacramento. (*People v. Wah Hing*, 327.)

**POLICE OFFICERS.**

1. **MUNICIPAL CORPORATIONS—SAN FRANCISCO—POLICE PENSION FUND—VESTED RIGHTS—MANDAMUS.**—A police officer of the city and

## POLICE OFFICERS (Continued).

county of San Francisco, upon proof of his disabilities, having been regularly granted a pension, pursuant to the provisions of section 3 of article VIII, chapter 10, of the charter, has a vested right to retain his place upon the retired list and to have his pension continued until his disabilities shall have ceased; and, so long as his disabilities continue, he is entitled to a writ of mandate to compel the board of police commissioners, acting as a board of police relief and pension fund commissioners, to maintain him in said position as a retired patrolman and to continue to pay his pension. (*Sheehan v. Board of Police Commrs.*, 29.)

2. **TERMINATION OF DISABILITY—JURISDICTION OF BOARD—VOID ORDERS.**—After a police officer of the city and county of San Francisco is thus regularly granted a pension, the attempted action of the board of police commissioners, acting in the capacity *ex officio* of the board of police relief and pension fund Commissioners, in declaring that his disabilities have ceased without any proof or showing upon the subject, and in the face of the practically undisputed fact that his disabilities have not ceased, is beyond their charter powers, and their attempted acts in so declaring and in seeking to compel him to report for duty as a patrolman, and in ordering his dismissal from the department for alleged insubordination in refusing to obey its order to so report to duty, are each and all void. (*Id.*)
3. **REMEDIES—CERTIORARI—MANDAMUS.**—That petitioner may have had also the right to apply for a writ of review to test in that form of limited inquiry the jurisdiction of the board of police commissioners to make its said several orders cannot be held to have deprived him of his larger and more fully effective remedy by way of a writ of mandate. (*Id.*)
4. **DEMANDS FOR PENSION WARRANTS—COMPLIANCE WITH CHARTER.**—The charter of the city and county of San Francisco having required that all claims against the pension fund be passed on by the board of police relief and pension fund commissioners, who should issue warrants to the persons entitled thereto, and the petitioner having made repeated demands upon the said board for the issuance of his pension warrant, which demands were refused, his right to recover accrued pension was not barred because he had not complied with the provision of section 1 of article III, chapter 4, of the charter, requiring the presentation of all claims upon the treasury of said municipality to the auditor and treasurer thereof within a limited period after the demand became due and payable. (*Id.*)

See Pensions, 1.

POSSESSION. See Claim and Delivery, 1, 8.

**PRELIMINARY EXAMINATION.** See Criminal Law, 6.

**PRESUMPTIONS.** See Appeal, 6; Checks, 1; Claim and Delivery, 8; Contracts, 28; Corporations, 3; Criminal Law, 28; Default, 4; Judgments, 13, 25; Libel, 11, 17; Mechanics' Liens, 2; Negligence, 38, 41, 42; Red-light Abatement Act, 1; Slander, 3; Workmen's Compensation Act, 6.

**PRINCIPAL AND AGENT.** See Agency.

**PRIORITIES.** See Equity, 1; Mortgages, 6

**PRISONS.** See Criminal Law, 21.

**PRIVILEGED COMMUNICATIONS.** See Libel, 18, 19.

**PROHIBITION.** See Divorce, 19.

**PROMISSORY NOTES.**

1. **SALE OF BONDS BY BANK TO DIRECTORS—VALIDITY OF CONSIDERATION.**—Where, following an impairment of the assets of a bank for which it could be closed, in order to relieve that embarrassment and to insure the bank's continuance in business, the directors, at the direction of the superintendent of banks, purchase certain corporate bonds from the bank, giving their several promissory note, secured by a pledge of the bonds, in payment, such note is based upon a valid consideration. (*Stern v. McDonald*, 79.)
2. **FRAUDULENT REPRESENTATIONS—RELIANCE ON—PLEADING.**—In an action on such promissory note, the defense of fraud, based upon certain representations claimed to have been made by the superintendent of banks at the time of its execution, is insufficiently pleaded where it is not alleged that the defendants relied upon said representations or that they believed them to be true. (*Id.*)
3. **MAKING OF REPRESENTATIONS — DENIAL — FINDINGS — APPEAL.**—In such action, the superintendent of banks and the bank examiner who took part in the transaction having denied that such representations were made, and the court having found that their testimony was true, that finding is conclusive on the appellate court, notwithstanding there was evidence to the contrary. (*Id.*)
4. **ACTION AFFECTING BONDS — DUTY TO PROTECT — ALLEGATION OF OWNERSHIP—RESCISSION OF SALE.**—After the bank became insolvent, an action having been commenced involving the bonds pledged to it as security for the note given in payment thereof, but to which the bank was not made a party, it was the duty of the superintendent of banks to intervene to protect the bonds and to controvert any claim made by third persons claiming ownership or seeking to obtain possession of said bonds, and it was not

**PROMISSORY NOTES (Continued).**

necessary in such proceeding that the superintendent of banks allege and prove that the bank held said bonds merely as a pledge; and his act in alleging in his cross-complaint in intervention that the bank was the owner of the bonds did not constitute a rescission or repudiation of their sale to the directors of the bank. (Id.)

5. **EXECUTION OF SEVERAL NOTE—VALIDITY OF—NONCOMPLIANCE WITH ORDER OF SUPERINTENDENT OF BANKS.**—The promissory note given by the directors of the bank in payment of the bonds was not invalid because it was a several note, and not a joint and several note, as the superintendent of banks had directed it should be. (Id.)
6. **SALE OF BONDS TO DIRECTORS—ABSENCE OF RESOLUTION AUTHORIZING—ESTOPPEL.**—In an action by the superintendent of banks against the directors of an insolvent bank on their promissory note given in payment of certain bonds purchased by them from the bank prior to its insolvency, the defendants are estopped from asserting that the sale of the bonds to them was not valid because it was not authorized by a resolution of the board of directors, but that it was made merely upon an order issued by the superintendent of banks. (Id.)
7. **EVIDENCE OF INDEBTEDNESS—VARYING TERMS BY PAROL.**—In an action to collect an alleged balance due on a promissory note, in the absence of any allegation or showing of fraud or mistake, it is error to permit the defendant to show by parol evidence that at the time he executed the note in question he did not owe the plaintiff the amount for which the note was given, but that he was entitled to credit on the note for the amount of certain payments made prior to that time. (Bledsoe v. Stuckey, 95.)
8. **ACTION TO COLLECT ALLEGED BALANCE—CROSS-COMPLAINT FOR OVERPAYMENTS.**—In an action to collect an alleged balance due on a promissory note given in payment of certain cattle, the defendant may, by cross-complaint, recover from the plaintiff any sum paid by him to the plaintiff in excess of his indebtedness on the transaction. (Id.)
9. **DEMAND FOR OVERPAYMENTS—PLEADING—ERROR WITHOUT PREJUDICE.**—In an action to collect an alleged balance due on a promissory note given in payment of certain cattle, a cross-complaint to recover overpayments on account of such indebtedness made through mutual mistake of the parties falls to state a cause of action where there is no averment of either demand for or nonpayment of the overpayments claimed by the defendant; but, under section 4½ of article VI of the constitution, error in overruling a general demurrer to such cross-complaint must be disregarded where it is apparent that such error was without prejudice. (Id.)

## PROMISSORY NOTES (Continued).

10. **FAILURE TO DEMAND OVERPAYMENTS—INTEREST RECOVERABLE.**—In the absence of a showing that the plaintiff willfully or wrongfully received the overpayments, the subject matter of the defendant's cross-complaint, and no demand having been made prior to filing the cross-complaint, defendant was not entitled to interest on the amount of his recovery under the cross-action prior to the date of filing his cross-complaint. (Id.)
11. **SECURED BY MORTGAGE—NEGOTIABILITY.**—A promissory note, secured by a mortgage on land, both being executed as parts of the same transaction, and containing a default and option clause, is not negotiable. (*Stoner v. Security Trust Co.*, 216.)
12. **PLEADING—ACTION ON PROMISSORY NOTE—SUFFICIENCY OF ANSWER.**—In an action upon a promissory note, it is error to enter judgment against the defendants upon the pleadings where their answer not only contains an express denial of the material allegation contained in the complaint as to nonpayment, but specifically alleges that the entire amount of principal and interest due upon the note has been fully paid. (*Hill v. Moore*, 353.)
13. **CONSIDERATION—AGREEMENT TO RELEASE DEFENDANTS FROM PAYMENT—SUFFICIENCY OF DEFENSE.**—In an action upon a promissory note, proof that a part of the consideration for defendants' transfer and assignment of a certain lease was plaintiff's agreement to release them from the payment of the note sued on would constitute a sufficient defense to plaintiff's right to recover. (Id.)
14. **ATTORNEY'S FEES—ACTION ON PROMISSORY NOTE—CHARGE INCURRED—EVIDENCE.**—The plaintiff in an action on a promissory note is not to be denied attorney's fees because of the fact that one of its attorneys is a regularly paid attorney for whose services in the case no additional charge is incurred, where the main counsel in the case is not connected with plaintiff, but is specially employed by plaintiff, and plaintiff is liable to this counsel for such an amount as will compensate him for his services. (*Title Ins. etc. Co. v. Gould*, 538.)
15. **VALUE OF SERVICES—DETERMINATION BY COURT—EVIDENCE.**—Where the complaint in such action alleges that a special attorney has been employed, and that attorney takes the stand and testifies to the different acts which he has performed in the conduct of the case from its commencement, the court is authorized to form its own conclusion as to the value of such services; and even though testimony is given by experienced attorneys as to what, in their opinion, would be a reasonable fee, the court, under such circumstances, may disregard such testimony and make an allowance for attorneys' fees in accordance with its own conclusion. (Id.)



## PROMISSORY NOTES (Continued).

16. **ESTATES OF DECEASED PERSONS—ACTION ON CLAIM—PERSONAL LIABILITY OF ADMINISTRATOR FOR COSTS.**—In an action upon a promissory note against the special administrator of the estate of the deceased maker of the note, following the rejection of a claim based on such note, it is within the discretion of the court to assess the additional costs incurred against the administrator personally without any particular finding of mismanagement or bad faith. (Id.)
17. **ACTION ON—DEFENSE—AGREEMENT TO REPURCHASE INTEREST IN INVENTION—FINDINGS—SUFFICIENCY OF EVIDENCE.**—In this action to recover upon a promissory note executed by defendant to plaintiff and his copartner as part consideration for the transfer to defendant by them of a one-third interest in an invention for the improvement of cameras, the evidence was sufficient to justify the findings of the trial court to the effect that plaintiff and his copartner agreed to repurchase the defendant's interest in the invention on or about a specified time, if the latter desired to sell, and that defendant, at the time specified, did elect to sell, and thereafter did sell, his interest in the invention to plaintiff and his copartner, and the latter paid to defendant a given sum of money on account of such repurchase, which amount the court properly added to the amount of the note sued on in determining the balance due defendant. (Mosley v. Seely, 608.)
18. **ACTION TO RECOVER BALANCE FROM UNDISCLOSED PRINCIPAL—UNSUPPORTED FINDING.**—In this action to recover a balance due on two promissory notes, the trial court was not justified in finding from the evidence presented that the defendant against whom judgment was rendered, but who did not sign the notes, was the undisclosed principal of his codefendant, who signed the note, but whom the court relieved from liability. (Hutchison v. Holland, 710.)

See Corporations, 6-8; Estates of Deceased Persons, 2; Negotiable Instruments, 3; Pleading, 4.

## PROPERTY.

1. **PLEDGE—APPARENT OWNERSHIP—ESTOPPEL.**—The general rule that one in possession of personal property can transfer to another, by pledge or sale, no greater interest in the property than he himself has, is subject to the exception that where the owner of the property clothes another with the apparent title to, or power of disposition over, it and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterward asserting his title. (Stoner v. Security Trust Co., 216.)
2. **BONA FIDE PURCHASER—NEGLIGENCE OF OWNER—PROXIMATE CAUSE OF DEBIT.**—A *bona fide* purchaser of a non-negotiable chose in

**PROPERTY (Continued).**

action, from one to whom the owner assigned apparent absolute ownership, may obtain a valid title as against such owner, although the assignee may not be the true owner; but if the purchaser from one who has not the title, and has no real authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit. (Id.)

See Divorce, 20; Insolvency, 9, 10.

**PUBLIC LANDS.** See Taxation, 1.

**QUIETING TITLE.**

1. **OWNERSHIP OF INTEREST IN TRUST—PLEADING—PROOF.**—In an action to quiet title against an execution levied on the property, the execution having issued in an action in which judgment was rendered against a brother of plaintiff, the defendants are precluded from offering proof that plaintiff holds an undivided one-half interest in the property in trust for such brother, where they do not plead a trust or any other equitable interest, but merely allege that such brother is the owner of an undivided one-half interest in the property. (Milliken v. Valencia, 16.)
2. **PLEADING—SUIT TO DETERMINE ADVERSE CLAIM—CONSTRUCTION OF COMPLAINT.**—A suit in the nature of an action to quiet title, the specific object of which is to cancel two purported assignments of a note and mortgage, and for the recovery of the money collected by the assignees under them, may be regarded as a suit under section 1050 of the Code of Civil Procedure to determine "an adverse claim . . . for money, or property upon an alleged obligation." (Stoner v. Security Trust Co., 216.)
3. **DECREE DIRECTING PAYMENT OF MORTGAGE—FINALITY OF JUDGMENT.**—In an action to quiet title, a judgment decreeing that the plaintiff is the owner of the property, subject only to a mortgage lien of the defendants, and that upon the payment of such mortgaged lien the plaintiff will be entitled to a decree quieting his title to the premises, is final and not interlocutory in its character. (Olds v. Thorington, 355.)
4. **INCORRECT DESCRIPTION—MUTUAL MISTAKE—EQUITY.**—Where the parties to an action to quiet title, by mutual mistake, incorrectly describe the property and the mistake in the description is contained in the judgment entered therein, in a subsequent action to quiet title and to correct the description a court of equity has the power to correct the mistake. (Dunning Brothers Co. v. Johnson, 397.)
5. **ACTION AGAINST ADMINISTRATOR—SCOPE OF JUDGMENT—PARTIES.**—A judgment entered in favor of the plaintiff in an action to quiet title against the administrator of the estate of a deceased person

**QUIETING TITLE (Continued).**

is binding upon her estate, and is binding and conclusive as against the heirs of said deceased, even though they are not made parties defendants. (*Schwarz v. Bohle*, 445.)

6. **DISCLAIMER BY DAUGHTER—ABSENCE OF INTEREST—WANT OF CONSIDERATION.**—The trial court, in such action, having determined that the property in question was the community property of the plaintiff and his deceased wife, and hence passed to him solely and absolutely upon her death, and that the daughter of such deceased wife never had any interest whatever in said property, the disclaimer by such daughter of any interest in the property, she having been made a party defendant, could furnish no consideration for an oral promise by plaintiff to deed her the premises upon demand. (*Id.*)
7. **CAPACITY OF GRANTOR—ORDER OF RESTORATION TO COMPETENCY—EVIDENCE.**—In an action to quiet title to real property involving the validity of the deed under which plaintiff claims title, the admission in evidence without objection of an order, made the same day the deed was executed, restoring the grantor to competency, is sufficient to support a finding that she was mentally competent to make such deed. (*Smyth v. Fitch*, 490.)
8. **MENTAL COMPETENCY OF GRANTOR—COMPLIANCE WITH CONDITIONS IN DEED—EVIDENCE.**—In this action to quiet title to certain real property, in addition to the admission of an order restoring to competency the grantor in the deed under which plaintiff claimed title, there was testimony by other witnesses that such grantor was capable of transacting business and of understanding the nature of the transaction resulting in the execution of said deed; and plaintiff's testimony, which was corroborated by the testimony of other witnesses, was sufficient to support the finding of the trial court that plaintiff complied with and carried out the conditions prescribed in such deed, and upon which the property was conveyed to her. (*Id.*)

See Adverse Possession, 2; Execution Sales, 2; Insolvency, 2, 11; Leases, 6; Pleading, 2; Vendor and Vendee, 9.

**RAPE.** See Criminal Law, 24.

**RATIFICATION.** See Agency, 7; Divorce, 10; Husband and Wife, 6.

**RECITALS.** See Bonds, 3; Judgments, 28.

**RECORDATION.** See Mortgages, 5.

**RECORDS.**

1. **RESTORATION OF RECORDS—DIVORCE ACTION—ALIMONY PROVISION—INSUFFICIENCY OF EVIDENCE—JUDGMENT.**—Upon an application for the restoration of the record in a divorce action, the court,

**RECORDS (Continued).**

if not fully satisfied from the evidence adduced in support thereof that the provision for alimony, alleged to have been a part of the original decree of divorce, correctly expresses the order previously made by it, is justified in refusing to direct the restoration of the record to the extent of including it. (*Richmond v. Denny*, 745.)

2. **DATE OF DIVORCE—REFERENCE TO RECORD OF TITLE COMPANY.**—In such a proceeding it is not error to refuse to allow a witness to testify regarding the date of the divorce action from a record of a title company, where such record was not made by her or under her direction. (*Id.*)

3. **SERVICE OF SUMMONS—HEARSAY EVIDENCE.**—In such a proceeding, testimony of the wife that she knew her husband, the defendant, was served with summons in the divorce action at a given place, if based on hearsay, is properly excluded; and it is not error to refuse to permit her counsel to show by tests of her recollection that she has a remarkable memory. (*Id.*)

4. **KNOWLEDGE OF DEFENDANT OF DIVORCE ACTION—CONVERSATIONS WITH PLAINTIFF IMMATERIAL.**—In a proceeding to restore the records in a divorce action, testimony of the plaintiff as to conversations had by her with the defendant subsequent to the divorce action, if offered for the purpose of showing that the defendant was personally served at a given place, that he knew a divorce had been granted, and that he knew the amount of the permanent maintenance, is immaterial and properly excluded. (*Id.*)

5. **NEW TRIAL UNAUTHORIZED.**—In a proceeding for the restoration of lost or destroyed records, a new trial is unauthorized. (*Id.*)

See Appeal, 8, 10, 14; Criminal Law, 12.

**RECOUPMENT.** See Contracts, 14, 15.

**RED-LIGHT ABATEMENT ACT.**

1. **USE OF PREMISES FOR IMMORAL PURPOSES—CONTINUED EXISTENCE—REBUTTAL OF CODE PRESUMPTION.**—In an action brought under the Red-light Abatement Act to abate a nuisance alleged to have been maintained in certain premises, the trial court having found, in accordance with the testimony of certain witnesses for the defendant, that the latter caused the persons who had been using the premises for immoral purposes to remove therefrom three days before the filing of the complaint in the action, and that at the time of the filing of the complaint, there was no tenant or other person whatever occupying said premises, the presumption, declared by section 1963, subdivision 32, of the Code of Civil Procedure, "that a thing once proved to exist continues as long as is usual with things of that nature," if it applies to the existence of such

**RED-LIGHT ABATEMENT ACT (Continued).**

a nuisance, is dispelled or overcome by other evidence. (*People v. Goddard*, 730.)

2. **FINDING THAT PROPERTY IS NUISANCE—CONCLUSION OF LAW.**—In such an action, the trial court having found that on and prior to a certain date the property in question was used for the purpose of lewdness, assignation, and prostitution, and that on a subsequent date, which was prior to the filing of the complaint, the owner caused the persons so occupying and using the same to remove therefrom, a further finding that "the said upper story of said building was and now is a nuisance under the laws of the state of California," taken alone or by itself, is a conclusion of law and does not involve a finding of fact. (*Id.*)
3. **EVICITION OF TENANTS—FAILURE TO REMOVE FURNITURE IMMATERIAL.**—In such an action, the trial court having found that the owner, upon learning the use to which her property was being put, caused the persons so occupying and using the same to remove therefrom, its further finding that the furniture in said building at and during the time the nuisance was being maintained therein was not removed from said premises at the time those using them for immoral purposes were compelled by the owner to vacate the building, possesses no significance as proving the continued maintenance of the nuisance. (*Id.*)
4. **INCONSISTENT FINDINGS—REVERSAL OF JUDGMENT.**—In such an action, where there are irreconcilably inconsistent findings upon a particular ultimate fact, such as the fact of the continued existence of the nuisance at the time of the commencement of the action, a judgment or decree in favor of the people so predicated cannot be upheld. (*Id.*)
5. **GOOD FAITH OF OWNER IN EVICTING TENANTS—EVIDENCE—UNSUPPORTED FINDING.**—In this action brought under the Red-light Abatement Act to abate a nuisance alleged to have been maintained in certain premises, the defendant having shown that immediately upon learning through a newspaper article of the use to which her premises were being put, she caused the females who were conducting the premises for immoral purposes to be evicted therefrom, and the prosecution having introduced no testimony tending to show that the closing of the place by the owner was not done in good faith, a finding that the act of the owner, in evicting therefrom the parties who were using it for immoral purposes, was not done in good faith for the purpose of permanently abating said nuisance, is unsupported. (*Id.*)
6. **ABATEMENT OF NUISANCE PRIOR TO SUIT—DISMISSAL OF ACTION.**—Where a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves

**RED-LIGHT ABATEMENT ACT (Continued).**

prior to the commencement of the action, the further prosecution of the action cannot be maintained and the action should be dismissed. (Id.)

**REFORMATION.** See Automobile Insurance, 3.

**RELEASE.** See Promissory Notes, 13.

**REMEDIES.** See Pledges, 1; Vendor and Vendee, 7.

**REPLEVIN.** See Claim and Delivery.

**REPRESENTATIONS.** See Vendor and Vendee, 1, 2.

**REPUTATION.** See Libel, 3.

**RESCISSION.** See Contracts, 17, 20; Promissory Notes, 4.

**RESIDENCE.** See Homesteads, 4.

**RES IPSA LOQUITUR.** See Negligence, 34.

**RES JUDICATA.** See Judgments, 2, 8, 19, 27.

**RESTORATION.** See Contracts, 20; Husband and Wife, 7; Judgments, 16.

**SALES.****1. OPTION—REPURCHASE OF AUTOMOBILE—TIME OF EXERCISE.—**

Where in connection with the purchase of an automobile the purchaser turns over to the dealer an automobile which he then owns, which it is agreed is to be held by the dealer for thirty days at a price to net the purchaser a given amount, and if not sold in thirty days the purchaser has the option to buy it back for a specified amount plus repairs put on it, the purchaser cannot be called upon to exercise his option to repurchase the machine immediately upon the expiration of the thirty days, but must be deemed to have been allowed a reasonable time thereafter within which to exercise that option; and the exercise of such option forty-five days after the option period had commenced to run was within a reasonable time where at that time the repairs on the car were not fully completed. (*Lee v. De La Motte*, 23.)

**2. ACTION FOR CONVERSION—DELIVERY OF BILL OF SALE—EFFECT OF CONTINUED POSSESSION.—**

In an action to recover for the alleged conversion of an automobile claimed to have been improperly seized under attachment process by the defendant

**SALES (Continued).**

sheriff, the jury is properly instructed that if they find that the judgment debtor in the action in which the writ under which the sheriff acted was issued, prior to the time of delivering to plaintiff a bill of sale for the automobile in question, had the use of said automobile, and that thereafter, subsequent to the delivery of said bill of sale, he still continued to have the use and control of said automobile in the same manner and to a like extent, there was no such delivery as the law contemplates as requisite to constitute a valid transfer. (*Tennant v. Cline*, 461.)

See Automobile Insurance, 8; Brokers, 1; Claim and Delivery, 1; Contracts, 2, 3, 5-7, 9, 10, 19, 29; Conversion, 3; Evidence, 8, 9; Judgments, 20; Promissory Notes, 4, 6, 17.

**SATISFACTION.** See Judgments, 10.

**SCHOOL LAW.**

1. **CHANGE OF SITE OF HIGH SCHOOL WITHIN CITY—POWER OF BOARD OF TRUSTEES.**—Under the amendment to section 1742 of the Political Code, enacted in 1919, the board of trustees of a high school district having a school building within the limits of an incorporated city by a majority vote may change the site of the high school from one place to another within the corporate limits whenever a new building is to be erected. (*Lawson v. Turlock U. H. School Dist.*, 252.)
2. **CONSTITUTIONALITY OF CODE AMENDMENT.**—The amendment to section 1742 of the Political Code, enacted in 1919, which permits the board of trustees of a high school district having a school building within the limits of an incorporated city, by a majority vote, to change the site of the high school from one point to another in the same city is not obnoxious to the provisions of article IV, section 25, subdivision 28, of the state constitution, which provides that the legislature shall not pass local or special laws prescribing the powers and duties of officers of school districts. (*Id.*)

**SECURITY.**

**ASSIGNMENT OF NOTE AND MORTGAGE—COLLATERAL SECURITY—EVIDENCE—FINDING.**—In this action to recover a note and mortgage, and certain sums of money alleged to have been collected thereon, the evidence was sufficient to sustain the finding of the trial court that the assignment from plaintiffs' predecessor to certain of the defendants was given as collateral security for money advanced, and that they were taken by them as such and not by way of absolute ownership for an adequate consideration. (*Stoner v. Security Trust Co.*, 216.)

See Guaranty, 4; Negotiable Instruments, 1; Vendor and Vendee, 11.

**SERVICE.** See Appeal, 18.

**SERVICES.** See Husband and Wife, 1.

**SHERIFFS.** See Attachment, 1.

**SLANDER.**

1. **DAMAGES RECOVERABLE—MALICE—INSTRUCTIONS.**—In an action for slander an instruction, in effect, that if the jury find that the defendant spoke the objectionable words of and concerning the plaintiff, they can award the plaintiff both compensatory and punitive damages, without regard to any consideration of malice or motive, but that they can decline to award damages for the alleged slander only in the event they should find that defendant did not utter the words charged of and concerning plaintiff, is prejudicially erroneous. (Wright v. Baldwin, 147.)
2. **EVIDENCE—PROOF OF MALICE.**—Malice is always an issue in an action for slander where plaintiff seeks punitive damages, but such malice may be proved directly or indirectly by direct evidence of the evil motive or intent or by inferences which may be drawn from the facts proved. (Id.)
3. **INFERENCE OF MALICE—PRESUMPTION—INSTRUCTIONS.**—Although, in awarding punitive damages, the jury may infer malice from an unprivileged utterance of a false charge slanderous *per se*, such inference must be drawn by the jury from the facts proved; it is not a presumption of law which the court itself can make. Failure to so instruct the jury is error. (Id.)

**STATUTE OF FRAUDS.** See Broker's Commissions, 2; Contracts, 18.

**STATUTE OF LIMITATIONS.** See Accounts, 1; Attorney at Law, 1; Claim and Delivery, 6; Common Carriers, 1; Corporations, 10; Findings, 2; Homesteads, 3; Insolvency, 11; Mortgages, 7; Negligence, 2; Poison Act, 3.

**STATUTORY CONSTRUCTION.**

**DUTY OF COURTS.**—It is the duty of the courts to interpret statutes in such a manner that they may be free from ambiguity, and not to be ingenious to find ambiguities in them because of extraneous matters, nor is it their duty to assume the function of the law-making power. (Rumetsch v. Davie, 512.)

See Ordinances, 1, 2.

**STOCK AND STOCKHOLDERS.** See Corporations, 1, 4, 11, 12.

**STOCKHOLDERS' LIABILITY.** See Corporations, 6, 10.



**STOP NOTICES.** See *Mechanics' Liens*, 8.

**STREET LAW.**

**1. BONDS—TERM—OMISSION TO DESIGNATE—CURE OF DEFECT.—**

Where the resolution of intention, in connection with proceedings for certain street work instituted and carried through under the provisions of the Vrooman Act and the Bond Act of 1893, provides that serial bonds shall issue to represent the cost and expense of the work, but the city council does not designate the period of time over which the bonds shall extend, and no objection in writing or appeal is filed, either from or concerning the assessment which is issued or the action of the superintendent of streets in designating in the warrant attached to the assessment the period of time over which the bonds shall extend, or otherwise, and bonds are accordingly issued, the defect, if not waived by the failure to appeal from the action of the superintendent of streets in fixing in the warrant the period of time over which the bonds should extend, is, under section 4 of the Bond Act, cured by the issuance of the bonds. (*Cohn v. Thompson*, 135.)

**2. ISSUANCE OF BONDS—DEFAULT IN PAYMENT—DEMAND FOR SALE OF PROPERTY—LAW GOVERNING.—**

Where the Improvement Act of 1911, at the time certain street work was performed and bonds were issued, required the treasurer after default and demand to publish a notice of the proposed sale in a newspaper and that a similar notice should be "served upon any such owner, if any, either personally or by depositing the same in the postoffice," etc., the city treasurer is not justified in refusing to proceed with the sale until the bondholder shall have first deposited with him the cost of having a search of the records made for the purpose of ascertaining the names of all lienholders of record, or unless the bondholder shall have had such search made on the ground that prior to default and demand for the sale of the property that act was amended so as to require a similar notice to be mailed to the person to whom the property is assessed and to all record lienholders. (*Oakland S. I. Bond Co. v. Fitzmaurice*, 258.)

**3. VROOMAN ACT—DATE OF ACTUAL COMPLETION OF WORK—CONFLICTING EVIDENCE—FINDING—APPEAL.—**

On appeal from the judgment in an action by a materialman against the sureties on a bond given by a contractor under the Vrooman Act, the appellate court is bound by the finding of the trial court as to the date of actual completion of the work, where that finding was based on conflicting evidence. (*Barr Lumber Co. v. Joy Const. Co.*, 408.)

**4. CONTROVERSY OVER WORK—COMPLETION TO SATISFACTION OF STREET SUPERINTENDENT—VERIFIED STATEMENTS BY MATERIALMEN**

## STREET LAW (Continued).

—**TIME FOR FILING.**—Where a contract for certain street improvements provides that the work is to be done to the satisfaction of the street superintendent and, notwithstanding the specifications call for the wetting down of the curbing for a period of seven days, the street superintendent insists that the specifications require that the cement be wet down for ten days, and the foreman for the contractor acquiesces in the street superintendent's demand to wet it for ten days, and does so, the thirty days within which materialmen must file their verified statements with the street superintendent commences to run from the date of actual completion of the work. (Id.)

5. **SUFFICIENCY OF VERIFIED CLAIMS FILED—SURPLUS MATTER IMMATERIAL.**—In this action against the sureties on a bond given by a contractor under the Vrooman Act, the verified claims filed with the street superintendent sufficiently complied with the requirements of section 6½ of said act; and such claims were not rendered insufficient by the statement made in each of them "that the said undersigned claims a lien upon any moneys, warrants, or bonds for the said sum aforesaid on account of said material so furnished for said improvement." (Id.)
6. **FORECLOSURE OF LIEN—PRIVATE CONTRACT—KNOWLEDGE OF VENDOR OF PROPERTY—EVIDENCE—FINDING.**—In this action to foreclose a lien for street work done under a private contract entered into with the vendee in possession under a written installment contract of purchase, the evidence was sufficient to support the finding of the trial court that the vendor of the property, who did not sign the contract to do the street work but whose president and general manager, upon being informed by the street contractors as to such contract and the nature and kind of the intended street work, expressed himself as pleased and said "it was a fine thing to do, to have the street paved with asphalt, and to go ahead and do the work," had knowledge of the work before, at, and during the course of the performance of the contract. (Raisch v. Helfrich, 494.)
7. **ESTOPPEL—FAILURE TO FILE NOTICE OF NONRESPONSIBILITY—APPLICATION OF CODE SECTION TO STREET WORK.**—By the amendment in 1911 of section 1192 of the Code of Civil Procedure, the legislature extended the statutory estoppel created by that section, on account of the owner's failure to file a notice of nonresponsibility, to street work liens under section 1191 of said code. (Id.)
8. **IMPROVEMENT ACT OF 1911—ISSUANCE OF BONDS—SUFFICIENCY OF RECITAL IN RESOLUTION OF INTENTION.**—A resolution of intention to order certain street work, under the Improvement Act of 1911 and Improvement Bond Act of 1915, is not vitiated by a recital therein "that a serial bond to represent unpaid assessment" will be issued where such resolution states further

**STREET LAW (Continued).**

that the bonds will be issued "in the manner provided by the Improvement Bond Act of 1915," a general reference in the proceedings prior to the warrant adopting the provisions of that act being sufficient to confer jurisdiction. (*Federal Construction Co. v. Ryan*, 637.)

9. **AMENDED RESOLUTION OF AWARD—RIGHT TO ADOPT—CORRECTION OF ERROR.**—In the improvement of streets under the provisions of the Improvement Act of 1911 and Improvement Bond Act of 1915, the city council has jurisdiction to pass an amended resolution of award in order to correct an error in its original resolution, provided at the time of the adoption of such amended resolution no rights of third persons have vested. (*Id.*)
10. **AMOUNT OF BID—RECITALS IN AWARD AND NOTICE—SUBSTANTIAL COMPLIANCE WITH LAW.**—Where the resolution of award recites that the contract for doing the work was awarded to a given company "at the prices named in its bid," and the notice of award as posted and published declares that the board of trustees "awarded the contract for said work to the lowest responsible bidder . . . at the prices named for said work in said proposal or bid on file," this constitutes a substantial compliance with the provisions of the Improvement Act of 1911. (*Id.*)

**STREETS.** See Negligence, 14.

**SUBROGATION.** See Appeal, 2.

**SUCCESSION.** See Divorce, 17.

**SUMMONS.** See Husband and Wife, 13; Judgments, 25; Pleading, 4.

**SUPPLEMENTARY PROCEEDINGS.**

1. **EXECUTION—IMMATERIAL ERROR IN TITLE—JURISDICTION—CONTENTPT.**—Where the given name of the plaintiff is erroneously stated in the order of examination made in a proceeding supplemental to execution, but all the information concerning the action and judgment are fully and accurately given in the order and in the affidavit upon which such order is based, certified copies of which are served on the person to whom such order is directed, the error being such that no one could be deceived or misled thereby, such order of examination is not void and the trial court is not thereby deprived of jurisdiction to render a judgment in contempt for failure to obey the same. (*Drew v. Superior Court*, 150.)
2. **PLEADING—CORPORATE EXISTENCE—ADMISSION BY PLEADINGS—COLLATERAL ATTACK ON JUDGMENT.**—The corporate existence of the defendant being established by the failure of the defendant to deny the allegation of that fact in plaintiff's verified complaint,

**SUPPLEMENTARY PROCEEDINGS (Continued).**

the judgment entered thereon against the corporation is final and conclusive upon said matter and is not open to attack in a proceeding supplemental to execution. (Id.)

**SURETIES.** See Guaranty, 2, 3; Negligence, 11.

**TAXATION.****1. IMPROVEMENTS ON PUBLIC LANDS—LIABILITY TO ASSESSMENT.—**

Though land in this state may be exempt from taxation because it belongs to the city, or to the state, or to the United States, improvements made thereon by an individual for his own use and benefit are subject to assessment and taxation. (*Outer Harbor Co. v. Los Angeles Co.*, 194.)

**2. COTTON IMPORTED FROM MEXICO—RETENTION AND STORAGE BY IMPORTER IN ORIGINAL BALES—NONLIABILITY FOR STATE AND LOCAL TAXES.—**

Cottons and bollies in flat bales imported into the United States from the republic of Mexico are not subject to state or local taxation so long as they remain the property of the importer and are contained in the unbroken original form or bales in which they were imported, it being immaterial that the bales are stored in various places in a warehouse in which home-grown cotton is also stored, that they were imported duty free, and that the form in which they were imported is not suitable for long transportation, it being necessary to compress the bales into more compact form for that purpose before delivering the same to the railroad for transportation. (*Imperial Development Co. v. City of Calexico*, 666.)

**3. ACTION TO TEST VALIDITY OF TAX LEVIED—SUBMISSION ON AGREED STATEMENT OF FACTS—RELIEF AUTHORIZED.—**

Where an action to test the validity of a tax levied on such cotton and bollies is submitted on an agreed statement of facts which contains conflicting statements as to the status of the property, it being stated in one place that plaintiff demanded of defendants the delivery of said property but that they refused, and now refuse, to deliver the same unless the tax is first paid, which plaintiff refused and refuses to do, and in another that the taxes were paid under protest, the trial court, under plaintiff's prayer for general relief, has power to do full justice between the parties in disposing of the litigation by directing a return of the property held, or of the money collected by the assessor, as the facts may warrant, and is not limited to granting plaintiff's specific prayer that the tax be declared invalid. (Id.)

**4. COTTON IMPORTED FROM MEXICO—RETENTION AND STORAGE BY IMPORTER IN ORIGINAL BALES—NONLIABILITY FOR STATE AND LOCAL TAXES.—**

Judgment reversed on the authority of *Imperial Development Co. v. City of Calexico*, ante, p. 666, except that this action

**TAXATION (Continued).**

involves a county tax sought to be levied. (Imperial Development Co. v. County of Imperial, 794.)

See License Taxes.

**TIME.** See Appeal, 3, 11; Common Carriers, 3; Corporations, 10; Default, 1; Fire Insurance, 3; Judgments, 23; Police Officers, 4; Sales, 1; Street Law, 4.

**TITLE.** See Claim and Delivery, 1; Contracts, 7, 8; Corporations, 1; Deeds, 1; Execution Sales, 1; Husband and Wife, 8, 12; Insolvency, 4, 7; Mortgages, 4; Parties, 1; Pleading, 2; Poison Act, 2; Property, 1, 2; Trusts, 2.

**TORTS.** See Mortgages, 1.

**TRADE NAMES.****1. INJUNCTION—SUFFICIENCY OF COMPLAINT—FINDINGS—EVIDENCE.**

In this action for an injunction to restrain the defendants from using and from conducting business under the name under which plaintiff had established and was conducting a school devoted to the art of music, and for damages, the complaint was sufficient as against a general demurrer, and the evidence was sufficient to sustain the findings of the trial court with reference to the deceit and fraud practiced by the defendants, other than the defendant corporation, upon the plaintiff by assuming and using the name under which the latter had been doing business. (*Mills v. Conservatory of Music*, 300.)

**2. PRIOR USE OF NAME—EQUITY.—**Where one has been first in the field doing business under a given name, courts of equity, in the interest of fair commercial dealing, will protect that person to the extent of compelling competitors to use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field. (*Id.*)**3. PLEADING—BREACH OF OBLIGATION BY DEFENDANTS—NATURAL RESULT—SPECIAL DAMAGE.—**The refusal of a music company to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music because of defendants' adoption in use of the same name as that under which plaintiff had been and was doing business constituted a special damage, compensation for which could be recovered only where such damage was specially pleaded. (*Id.*)

**TRANSFER.** See Insolvency, 7, 8.

**TRIAL.**

1. **NOTICE OF HEARING—DEFAULTING DEFENDANT.**—The notice of time of hearing of an action, as provided by section 594 of the Code of Civil Procedure, need not be given to a defaulting defendant. (*Uplinger v. Yonkin*, 435.)
2. **FAILURE TO GIVE NOTICE—JURISDICTION TO ENTER JUDGMENT.**—In those cases where the requirements of section 594 of the Code of Civil Procedure are applicable, a trial and judgment given without such notice is merely erroneous and is not in excess of the court's jurisdiction. (*Id.*)
3. **ABRUPT MANNER OF TRIAL JUDGE—EFFECT ON APPELLANT'S COUNSEL—LACK OF PREJUDICE.**—A judgment will not be reversed on appeal because the trial judge, in expressing his rulings, spoke laconically, decisively, and with great brevity, where there is nothing to show that the disposition of the court was other than usual, or that any prejudice resulted to appellant which prevented him from showing that the facts were different from those appearing in the record, however much the abrupt manner of the trial judge may have been disconcerting to appellant's counsel. (*Lewis v. Crenshaw*, 781.)

**TRUSTS.**

1. **ACTION TO ESTABLISH—EVIDENCE—FINDING.**—In this action brought to have it determined that the defendants held certain real property which, it was alleged, had been purchased with funds belonging to the plaintiff and to have a trust thereon declared in his favor, in which the defendants claimed that the property in question was purchased with moneys belonging to them before they came to this state, the testimony of the defendants was so surrounded with the elements of uncertainty, improbability, and suspicion that the trial court was justified in disregarding it and in finding that at the time they came to this state they had no property of any substantial value. (*Willits v. Helmer*, 309.)
2. **CONTINGENT INTEREST OF TRUSTOR—SALE ON EXECUTION—EFFECT OF SALE BY TRUSTEE—TITLE TO PROPERTY.**—Where real property is conveyed to a trustee for the benefit of certain creditors of the grantor, with power to manage and sell said property and to apply the proceeds to the payment of said debts, and to pay the balance, if any, over to the grantor, such grantor, up to the time of sale, has a contingent interest in the property, which may be levied upon and sold under execution, but upon a sale by the trustee, pursuant to the terms of the trust, the purchaser acquires both the legal and the equitable title to the property, discharged of all trusts, the contingent interest of the original grantor in the property being changed into a contingent interest in the

**TRUSTS (Continued).**

proceeds of the sale, provided any exists after the purposes of the trust have been fulfilled. (*Kibbe v. Graves*, 575.)

See Pleading, 2; Quieting Title, 1.

**UNDUE INFLUENCE. See Divorce, 7.****VENDOR AND VENDEE.**

1. **PRESENCE OF GAS-PIPES UNDER LAND—REPRESENTATION OF EXISTING FACT.**—A representation by the vendor to the vendee under a contract for the purchase of certain land "that gas-pipes were already upon or under the land" is of an existing fact, and not a promise of something to be done before the completion of the contract. (*Edge v. Bryan*, 312.)
2. **"VIRGIN SOIL"—EXPRESSION OF FACT.**—A representation by the vendor to the vendee that the land agreed to be sold was "virgin soil" was an expression of fact, and not one of opinion, where, on being asked what "virgin soil" meant, the vendor said that it "had been a sheep pasture and never cultivated." (*Id.*)
3. **REPRESENTATIONS OF VENDOR—RELIANCE ON BY VENDEE—WHEN NOT EXPRESSIONS OF OPINION—ESTOPPEL.**—Where the vendee relies on the representations of the vendor, and acts upon the faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representations were mere expressions of opinion, when they are discovered to be false. (*Id.*)
4. **SUFFICIENCY OF PLEADING AND PROOF.**—In this action by the vendee against the vendors to rescind a contract for the purchase of land, and for damages, the plaintiff not only alleged, but proved, that she believed the representations made by the defendants were true and relied upon them and that she was damaged thereby. (*Id.*)
5. **DEFENSE NOT PLEADED—REJECTION OF EVIDENCE PROPER.**—In such action, the trial court properly sustained plaintiff's objections to certain evidence offered by defendants, which evidence tended to prove that during a certain period of time the land which was not under cultivation was covered with barley stubble, and as to whether defendants had themselves farmed this particular piece of land, where there was no allegation setting up that defense. (*Id.*)
6. **EJECTMENT BY VENDOR—VENDEE IN POSSESSION—EQUITABLE DEFENSES.**—Vendees in possession, under a contract of purchase, not having performed their contract, and being in default with their payments, cannot maintain an equitable defense to an action of ejectment by the vendor. (*Hincksman v. Delacour*, 416.)
7. **FRAUD OF VENDOR—REMEDIES OF VENDEE—DEFAULT—EJECTMENT.**—Vendees in possession, under a contract of purchase which

## VENDOR AND VENDEE (Continued).

they were induced to enter into through the false and fraudulent representations of the vendor, must pay the purchase price, according to the contract, and receive such title as the vendor is able to give, if they choose to retain possession of the land, or they may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the other expenditures, after deducting therefrom the fair rental value of the premises. Refusing to adopt either course, they are liable to an action of ejectment by the vendor, in which they are not entitled to recover the purchase money paid. (Id.)

8. **FAILURE TO MAKE PAYMENTS—TERMINATION OF RIGHTS.**—When, in a contract for the sale of land, time is made of the essence of the contract, an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party, and no notice is required to terminate his rights under the contract. (Darter v. Schuyler, 457.)
9. **FORFEITURE BY VENDEE—SUBSEQUENT CONVEYANCE BY VENDOR—ACTION TO QUIET TITLE—PARTIES.**—The default of the vendee in making the payments as called for by the contract of purchase having operated *ipso facto* as a forfeiture of the contract and her rights thereunder, in an action by the grantee under a subsequent conveyance to quiet the title to the property as against such defaulting vendee, the grantor is neither a necessary nor a proper party to the action. (Id.)
10. **WAIVER OF STRICT PERFORMANCE—CONFLICTING EVIDENCE—FINDING—APPEAL.**—The trial court, upon conflicting evidence, having found that the defendant was not excused from making the payments as the same became due, by any act or conduct on the part of her vendor, and that no act or conduct on his part justified her in failing to perform her part of the contract, the contention, on appeal, that there was a waiver of the strict performance of the terms of the contract by the vendor as to such payments cannot be sustained. (Id.)
11. **TRANSFER OF PROPERTY AND CONTRACT AS SECURITY—LIABILITY OF GRANTEE TO VENDEE.**—The vendee of land, upon being notified by the grantee of his vendors, to whom the contract of sale was also assigned, that no further payments would be received, as there was some question about the title to the land (a proceeding to foreclose a prior mortgage of record having been instituted), is not entitled to recover from such grantee the payments made under the contract of purchase, where the latter took the deed and assignment merely as security for certain sums of money which he had paid out under a surety bond ex-



**VENDOR AND VENDEE (Continued).**

cuted for the benefit of such grantors in connection with an independent leasing transaction and did not assume the obligations of his grantors. (*Lewis v. Crenshaw*, 781.)

**VENUE.** See Place of Trial.

**VERDICT.** See Evidence, 7; Negligence, 13, 19-21.

**WAIVER.** See Criminal Law, 25, 26; Street Law, 1; Vendor and Vendee, 10.

**WATER COMPANIES.** See Corporations, 1.

**WATERS AND WATER RIGHTS.** See Corporations, 2; Water Companies.

**WORKMEN'S COMPENSATION ACT.**

1. **EMPLOYMENT OF ATTORNEY BY APPLICANT—AGREEMENT FOR ATTORNEY'S FEES—REVIEW OF BY COMMISSION.**—An applicant for compensation under the Workmen's Compensation Act is entitled to be represented by counsel in proceedings before the Industrial Accident Commission; and if an applicant, who has entered into a contract employing an attorney and agreeing to pay him a given fraction of the amount recovered as compensation for the services to be rendered, seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid. (*Schilling v. Industrial Acc. Com.*, 190.)
2. **REASONABLENESS OF FEE—JURISDICTION OF COMMISSION.**—On such a hearing the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission. (*Id.*)
3. **INJURY TO EMPLOYEE WHILE ON VACATION—SCOPE OF EMPLOYMENT.**—Under the Workmen's Compensation Act, an injury sustained by an employee when, upon his own time, free from any duties to his employer, he is engaged in the diversions of his vacation, is not an injury arising out of and in the course of his employment, notwithstanding at the time of the injury he is returning from a railway station, at which place among the things

**WORKMEN'S COMPENSATION ACT (Continued).**

done, he mailed a letter in answer to one he received from his employer on a matter connected with the business of the latter. (Casualty Co. v. Industrial Acc. Com., 387.)

4. **GENERAL ORDERS OF COMMISSION—EVIDENCE—JUDICIAL NOTICE.**—Courts cannot take judicial notice of a general order of the Industrial Accident Commission. (Schmidt v. Purcell, 440.)
5. **FAILURE TO COMPLY WITH ORDERS—WANT OF NOTICE—NEGLIGENCE.**—Failure of an employer to comply with some general order of the Industrial Accident Commission of which he had no notice would not constitute gross negligence. (Id.)
6. **REASONABLENESS OF ORDERS—PRESUMPTION—WHEN APPLICABLE.** The conclusive presumption, prescribed by section 66 of the Workmen's Compensation, Insurance and Safety Act, that every order of the commission is reasonable and fixes reasonable and proper standards and requirements for safety, does not apply to an action for damages instituted by an employee under section 12 (b) of the act. (Id.)
7. **WHEN ORDERS EFFECTIVE.**—Under section 59 of the Workmen's Compensation, Insurance and Safety Act, orders of the commission do not become effective until served upon the employer. (Id.)
8. **ACTION FOR DAMAGES—REASONABLENESS OF ORDERS—ISSUE OF NEGLIGENCE—PROPER FINDINGS.**—In an action for damages instituted by an employee against the employer under section 12(b) of the Workmen's Compensation, Insurance and Safety Act, the reasonableness of the orders of the commission (the violation of which plaintiff relied on to prove gross negligence on the part of the defendant), having been directly put in issue by the allegations of the complaint, and the court having found in effect that such orders were unreasonable, a finding upon the issue of gross negligence and willful disregard of the safety of the employee is proper. (Id.)
9. **WAIVER OF COMPENSATION UNDER ACT—GROSS NEGLIGENCE—BURDEN OF PROOF.**—In such an action, the plaintiff having waived his right to compensation afforded him by the act and chosen to proceed in such action at law for damages, it is incumbent upon him to prove that the injury resulted both from the gross negligence (or willful misconduct) of the defendant and from the willful disregard of the life, limb, or bodily safety of plaintiff. (Id.)
10. **WILLFUL DISREGARD OF SAFETY OF EMPLOYEE—WHAT CONSTITUTES.**—To willfully disregard the safety of an employee is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge. (Id.)

**WRIGHT IRRIGATION ACT.** See Irrigation, 1-3.







